A

COLLECTION OF CASES

OVERRULED, DENIED, DOUBTED,

OR

LIMITED IN THEIR APPLICATION,

TAKEN FROM

AMERICAN AND ENGLISH REPORTS.

BY SIMON GREENLEAF,

COUNSELLOR AT LAW, AND PROFESSOR OF LAW AT HARVARD UNIVERSITY.

SECOND EDITION, REVISED AND ENLARGED.

Albany:

PUBLISHED BY WM. & A. GOULD & CO.

LAW BOOKSELLERS, NO. 108, STATE STREET,

AND BY GOULD, BANKS & CO.

LAW BOOKSELLERS, NEW YORK.

1838.

E. AND L. MERRIAM, PRINTERS,
BROOKFIELD, MASS.

ADVERTISEMENT.

In revising this work, with a view to the present edition, much care and attention have been bestowed. The difficulty of a proper execution, will be readily appreciated, when it is recollected, that the books of Reports seldom contain any guides to the Cases sought for. However troublesome this circumstance has proved in the prosecution of the work, it has rather served to increase our diligence in exploring these *terra incognita*:—and ancient as well as modern Reporters have been examined.

Errors are peculiarly incident to a work of this kind; but whatever may be the imperfections of this edition, it is proper to observe, that the author of the original work is in no respect responsible; the revision and corrections not having been submitted to his inspection.

CASES OVERRULED,

DENIED AND DOUBTED.

1. ABBOT v. PLUMBE, 1 Doug. 216; cited 7 T. R. 267; 2 East, 187; and 1 Phil. Ev. 464, 5.

That the execution of every attested instrument whether sealed or not, ought to be proved by the subscribing witness, if he can be produced; and that an acknowledgment of the obligor of a bond, admitting that he executed it, will not dispense with the testimony of the subscribing witness.

Relaxed in New York as to negotiable paper. Hall v. Phelps, 2 John. R. 451; (16 ib. 201). Fitchorn v. Boyer, 5 Watts, 159.

2. ABBOT v. SEBOR, 3 J. Cas. 39.

S. P. as in Juhel v. Church, (post).

3. ABBOTT ON SHIPPING.

An omission in Abridgment of the Factors' Act. 6 G. 4. c. 94.—(*As a security for any money or negotiable instrument.*) See Taylor v. Kymer, 3 B. & Ald. 337.—Also Leg. Exam. vol. 4. p. 339, 340.

4. ABBOTT v. SMITH, 2 Bl. 497.

It was said that one partner who hath been sued, and obliged to pay damages incurred by the whole firm, may maintain an action against the rest for contribution.

Denied in Gow on Part. 3d ed. p. 79. Sadler v. Hickson, K. B. Hil. 1834, cited in Smith on M. L. p. 16, n.

5. ABBY v. BUXTON, Carth. 136.

S. P. as in Rogers v. Mayhoe, (post).

6. ABEL v. HEATHCOTE, 4 Bro. C. C. 278; 2 Ves. Jun. 98.

That a power to exchange will authorize a partition.

Doubted by Ld. Eldon in 11 Ves. Jun. 467; 4 Bro. C. C. 277, by Belt. See Sug. on P. p. 273, (Am. ed.)

7. ABRAHAM v. BUXTON, 1 Paige's Ch. R. 236.

Reversed in S. C. 3 Wend. 538.

8. ACHERLY v. VERNON, 1 P. Wms. 173.

Doubted in Ellis v. Ellis, 1 Scho. & Lef. 5.

9. ADAMS v. BROUGHTON, 2 Strange, 1078; 6 Bac. Ab. tit. Trover; Let. A. p. 679.

If the plaintiff in an action of trover has recovered damages for the conversion of the goods, the property thereof vests in the defendant, who, as damages to the value have been recovered against him, is to be considered as a purchaser.

Denied in Hepburn v. Sewell, 5 Har. & J. 212.—"Judgment, and its fruit, to wit, the payment of the amount thereof, must both concur, to vest the right of property in the defendant."

10. ADAMS v. KELLOGG, Kirby's R. 195.

That a feme covert could devise her real estate to her husband.

Overruled in Fitch v. Brainard, 2 Day's R. 163.

11. ADAMS et al. v. LELAND, 7 Pick. 64.

"The contents of the deed cannot be proved by the affidavit of the party."

Denied. See 8 Amer. Jurist, 30, (July 1832):—"But if, as the authorities show, he may prove the loss, why not the contents?"

12. ADAMS v. LINGARD & al. Peake's N. P. Ca. 117.

That the indorser of a bill of exchange may be admitted as a witness to invalidate it.

Denied in Churchill v. Suter, 4 Mass. R. 156. Vid. also Warren v. Merry, 3 Mass. 27. Parker v. Lovejoy, ib. 565.

13. ADAMS v. MEREDEW, 2 Y. & J. 417.

Overruled in S. C. 3 Y. & J. 219.

14. ADAMS ON EJECTM., citing Doe v. Jeffries, K. B. M. T. 1814 MS.

Denied in Den v. Snowhill, 1 Green R. 33.—Ewing.

15. ADLINGTON v. CANN, 3 Atk. 141, 154.

Overruled *per* Thompson, B. 3 Anstr. 941.

16. AFRICAN COMPANY v. BULL, 1 Show. 132. Gilb. 238.

That where a policy is subscribed by several, and the goods not equal in value to the whole sums subscribed, the underwriters shall be liable in the order in which they subscribed, and the remaining underwriters be discharged.

Overruled, Vide Marshall on Ins. 116 et seq. Newbury v. Reed, 1 Bl. 416.

17. AINSLEE v. MARTIN, 9 Mass. R. 454.

That a person born in Massachusetts Bay before the declaration of independence, is considered as born within the allegiance of the Commonwealth of Massachusetts, the lawful successor; although before July 1776 he removed into Canada and had never returned.

Denied by Chan. Kent, in 2 Com. p. 39 to 41—citing Gardner v. Ward, and Kilham v. Ward, 2 Mass. 236, 244 note; and the case of Phipps, 2 Pick. 394, note.

18. ALBANS v. BEAUCLERK, 2 Atk. 635.

Said not to be correctly reported. 2 Russ. 262; (3 Cond. R. 106.)

19. ALCHORNE v. GOMME, 2 Bing. 54.

Doubted in Pope v. Biggs, 9 B. & C. 245.—Parke.

20. ALCINBROOK v. HALL, 2 Wils. 309.

Overruled in Clayton v. Dilly, 4 Taunt. 165; vid. Faikney v. Reynolds, (post.)

21. ALDEN v. GREGORY, 2 Eden, 280.

Length of time being no bar in cases of fraud.

Doubted in Byrne v. Frere, 2 Moll. 176.

22. ALDERMAN v. FRENCH, 1 Pick. 1.

S. P. as in Jackson v. Stetson, (post.)

23. ALDERSON v. BUCKTON, 1 Str. 192.

Where the consequential damage (in trespass) is of such a nature as to constitute by itself a separate ground of action, the party is entitled to full costs without any certificate.

Denied in Daubney v. Cooper, 10 B. & C. 830 by Ld. Tenterden, C. J. who says,—"I certainly was not aware of that case, nor can I consider it as good law. It has never been quoted, nor acted upon by the court."

24. ALEXANDER v. COMBER, 1 H. Bl. 20.

The observation of Wilson, J. that where the sale is *not immediate*,

it is not within the statute of frauds.

Overruled in Rondeau v. Wyatt, 2 H. Bl. 63.

25. ALEXANDER v. GIBSON, 2 Camp. 556—Ellenborough.

"The party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated."

Overruled in Bradley v. Ricardo, 8 Bing. 57:—*Held*, that a party being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not, therefore, to be repudiated by the judge—it is for the jury to say whether his evidence is to be entirely repudiated or not. The correct rule is laid down in Bul. N. P., namely, that a party cannot be permitted to produce general evidence to discredit his own witness; but it would be monstrous if the whole of his testimony were to be struck out because a subsequent witness sets him right as to a single fact which he may have stated incorrectly. See also Friendlander v. Priestly, 4 B. & Ad. 198.

26. ALEYN'S REPORTS.

Denied by Dolben, J. (2 Show. 164). "Mistaken in several cases, as to the very resolutions of the court."

27. ALLAN v. BOWER, 3 Bro. Ch. Ca. 149.

There was a paper found signed by *Bower* deceased, saying it was reasonable to grant plaintiff a lease, on account of the improvements he had made: which Lord Thurlow seemed to think satisfied the statute of frauds.

Doubted. The general grounds of this opinion in this case (and in Tawney v. Crowther) are questioned by Lord Redesdale in Clinan v. Cooke, 1 Sch. and Lefr. 33. 37.

28. ALLEN v. ADLINGTON, 7 Wend. 9.

Reversed in Adlington v. Allen, 11 Wend. 374 for error in instructions to the jury; but the principle of the action seems to be affirmed. *Held*, that in *case* for a *fraudulent representation*, by means of which goods are sold on credit and a loss ensues, the declaration should contain an averment that the representation was made *with the intent to deceive and defraud:* otherwise it will be bad even *after verdict*.

29. ALLEN v. IMLETT, Holt's R. 641.

Oppo. Allen v. Impett, 8 Taunt. 263; 2 J. B. Moore, 240. S. C.

30. ALLEN v. RIVINGTON, 2 Saund. 111.

Where it appeared by the record of a special verdict that the plaintiff, the lessee in ejectment, had possession prior to the ouster, and no title was found for the defendant, it was held that the plaintiff was without question entitled to recover.

Denied in 2 Saund. 111 note, and in Doe v. Billyard, 3 M. & Ry. 112. note.

31. ALLEN v. RISTON, 2 G. & J. R. 86.

Doubted. It seems to follow the cases of Nugent v. Gifford (post). See Field v. Schieffelin, 7 J. Ch. R. 157, and Petrie v. Clark, 11 S. & R. 377.

32. ALLEN v. SEWALL, 2 Wend. 327.

Reversed in Sewall v. Allen, 6 Wend. 335; deciding that a *steamboat company* are not common carriers of bank bills, unless such is part of their *ordinary business;* although their act of incorporation made them liable as such and they were incorporated for the transportation of *goods wares and merchandize.*

33. ALLESBROOK v. ROACH, 1 Esp. 351.

The *jury* were allowed by Ld. Kenyon to decide the genuineness of a bill of exchange, by comparing it with other signatures admitted to be the defendant's.

Oppo. to the prior case of Bookbard v. Woodley, cited in Peake's N. P. C. 21, n. and to the subsequent case of Da Costa v. Pym, Peake's Ev. App. lxxii, where Ld. Kenyon cites with approbation the rule of Bookbard v. Woodley.

34. ALLINGHAM v. FLOWER et al., 2 Bos. & Pul. 246.

Held in Birn v. Bond, 6 Taunt. 554, to be inconsistent with prior cases, and overruled. Vid. How & Lacy, 1 Taunt. 119.

35. AMBLER'S REPORTS.

Questioned in the preface to Eden's Reports and in 1 Kent's C. 460.

36. AMBROSE v. HOPWOOD, 2 Taunt. 61.

If a bill be accepted to be paid at a particular banking house, the declaration must state that it was presented there for payment.

Overruled in Fenton v. Goundry, 13 East, 459. See also Callaghan v. Aylett, 2 Campb. 549.

37. AMERICAN INS. CO. v. CENTER, 4 Wend. 45.

It was said " In this country the right of the master to sell must ne-

cessarily be more extensive (than in England): if there be "a technical total loss" he may sell, if he thinks his owner will elect to abandon."

Doubted. See Hall v. Franklin Ins. Co., 9 Pick. 466: *Held*, that to authorise the master to make sale of the vessel, it must be a case of "necessity which leaves no alternative; which prescribes the law for itself, and puts the party in a positive state of compulsion to act." Freeman v. East India Co., 5 B. & Ald. 617. This English and Massachusetts rule seems "the one best supported by reason and authority." 3 K. C. 173, n. (c). Sch. Tilton, 5 Mason, 481.

38. AMORY v. FRANCIS, 16 Mass. R. 308.

A creditor holding a mortgage for less value than his debt, is entitled to have allowed the difference between his debt and the value of the property mortgaged.

Oppo. Moses v. Ranlet, 2 N. H. R. 488. Findlay v. Hosmer, 2 Conn. R. 350.

39. ANDERSON v. ANDERSON, 2 Mylne & Keene, 427.

A testator bequeathed leasehold property to his daughter for her own and sole use free of control of any present husband, or any husband to come. The daughter was unmarried at the date of the will, and at the death of the testator. She married without a settlement, and, having shortly afterwards separated from her husband, she filed a bill against him, claiming to be entitled to the leasehold property bequeathed to her separate use:—*Held*, that she was so entitled; and a conveyance to the plaintiff, to her sole and separate use, was directed accordingly.

Overruled in Massy v. Parker, 2 Mylne & Keene, 174. See 2 K. C. 165 n. (a).

40. ANDERSON v. MAY, 2 B. & P. 237.

Explained in Colling v. Treweek, 6 B. & C. 394:—"From the report of that case in 3 Esp. 167, it may be collected that the bill delivered was not made at the same time with the copy; the one produced was *not a copy* of the other, but a duplicate original, the two having been copied from the books of the plaintiff.

41. ANDREW v. HANCOCK, 1 Bro. & B. 37; Spragg v. Hammond, 2 ib. 59.

Unless the tenant deducts the rent from the current year, he can neither deduct nor recover it.

Doubted in Comyn, Land. & Ten. 230. n. (f.)

42. ANDREWS v. BEECHER, 1 John. Cas. 411; Wardell v. Eden, 1 J. R. 531. n. (a); Littlefield v. Storey, 3 J. R. 421.

A release from the obligee, after the assignment of a bond with notice, was considered a nullity, even where the action is brought in the name of the releasor.

Denied in Bulkley v. Landon, 3 Conn. R. 76, 83.

43. ANDREWS v. BROWN, Prec. in Ch. 385.

Overruled. See Jones v. Scott, Rus. & M. 255. (4 Cond. R. 421.)

44. ANDREWS v. FRANKLIN, 1 Str. 24.

"To pay within two months after a ship is paid off" is good in a promissory note; and negotiable.

Doubted in 3 K. C. 75 n. (d).

45. ANDREWS v. SOLOMON, 1 Pet. R. 356.

Professional confidence does not apply to clerks in the office.

Oppo. Taylor v. Foster, 2 C. & P. 195. Sed see Levy v. Pope, 1 Mo. & M. 410.

46. ANON. v. BANBURY, 41.

Denied in Jackson v. Campbell, 5 Wend. 578; "Banbury's cases are not of very high authority."

47. ANON. Cited in Bristow v. Waddington, 5 Bos. & Pul. 360.

Questioned in Powell v. Saunders, 5 Taunt. 28.

48. ANON. 1 Bulstr. 184.

Where it is said that an umpirage would be vitiated by the arbitrator's joining in it.

This case is said to be "an error of the reporter." Soulsby v. Hodgson, 3 Burr. 1474.

49. ANON. 2 Ch. Ca. 19.

Denied by Gibson, C. J. in Lightly v. Shorb, 3 Pen. R. 451. "Not only is the authenticity of the report questionable, as not having been taken by the reporter himself, but the principle of the case has been repudiated by every writer since."

50. ANON. 1 Comyn, 150.

That an executor may traverse the devise of an executorship to another. Also, that payment to an executor having probate, if the probate is afterwards repealed, does not discharge the party against the legal executor.

Denied in Allen v. Dundas, 3 Term R. 130, 131. by Buller, J. who says this case "carries its own death wound on the face of it."

51. ANON. Cowp. 128.

In debt on judgment exceeding £10 in the whole, thought the original debt was less than £10 it was said defendant could not be holden to special bail.

Overruled in Lewis v. Pottle, 4 Term 570.

52. ANON. 2 East, P. C. 697, 1 Leach, 415 (n).

A porter was intrusted with a bundle to carry to W.; and the woman went with him. He ran away with the bundle in going; and Holt, C. J. told the jury that if they thought the porter opened the bundle and took out the goods, it was felony; and he thought that the fact stated was evidence of it.

Doubted by Mr. East, ib. "A different ground for the determination is suggested in another MS. (2 MS. 233.) viz. that all the circumstances showed that the porter took the bundle at the first, with an intent to steal it."

53. ANON. 1 Freeman, 450. pl. 612.

Overruled, Hayes v. Bickerstaff, Vaugh. 122. Dudley v. Folliott, 3 Term. R. 584.

54. ANON. 2 Freem. 105.

Overruled, *it seems*, in Wollet v. Harris, 5 Madd. 452; Vezey v. Jameson, 1 S. & Stu. 69; Bagwell v. Dry, 1 P. Wms. 700; Pring v. Pring, 2 Vern. 99; also Math. on P. Ev. 171 note (b).

55. ANON. 2 Freem. 192.

Overruled by Clifford v. Lewis, 6 Madd. 33.

56. ANON. Godb. 2 pl. 2 Moor, 54 pl. 157.

Overruled in Young v. Radford, 1 Brownl. 129.

57. ANON. Godb. 10. pl. 14.

Overruled in Bond v. Richardson, Sav. 96; Cro. Eliz. 142; S. C. 1 Freem. 526; Jenk. 58 in Marg. Bridgm. 91; 7 Mod. 231; 10 Mod. 147. acc.

58. ANON. Godb. 157. pl. 213.

Overruled in Chanellor v. Thomas, Yelv. 143; 1 Brownl. 142. S. C.

59. ANON. Hardr. 485.

Overruled in Rabourg v. Peyton, 2 Wheat. 385.

60. ANSON v. LEE, 4 Sim. 404.

Sugd. (on Pow. p. 403. n. (1)):—'There is some error in the judgment.'

61. ANON. 1 Lev. 68.

Where Bridgman is made to say that imprisonment by the king's writ will not be duress to avoid a deed, though the arrest be without cause of action, &c. "This must be a mistake." Parsons, C. J., 6 Mass. 512.

62. ANON. 1 Ld. Raym. 739.

It was ruled by Holt, that "if a ship be bound for the East Indies, and from thence to return to England, and on her return she is taken by enemies, the mariners shall have their wages, for the voyage to the East Indies, and for half the time that she stayed there to unlade and no more."

Denied in Bronde v. Haven, 1 Gilpin, 601, 2.—Hopkinson.

63. ANON. 1 Ld. Raym. 639.

Denied in Bronde v. Haven, 1 Gilp. R. 601, et seq.

64. ANON. 12 Mod. 408.

Similar to the case of The Cynthia (post).

Denied in Bronde et al. v. Haven, 1 Gilpin, 592.

65. ANON. 12 Mod. 620.

"Holt, Ch. J. 'A judge of N. P., upon trial of a writ of enquiry, is only an assistant to the sheriff, and has no judicial power; and if the parties come to any agreement there, the way to make it effectual is, to bring it to him to sign, and afterwards move above to have it made a rule of court.'"

Overruled in Ellsworth v. Thompson, 13 Wend. 658; and Savage, Ch. J. says, "Rather than admit such a proposition, it would be more reasonable to suppose there must be some mistake in the report of the case particularly where the only authority for such a proposition is found in an anonymous case, published by an anonymous reporter—in a book of no authority and of very small repute."

66. ANON. Moseley, 96.

Overruled in Elliot v. Merryman, Barn. Ch. R. 78; 2 Atk. 41; Ambler, 189. n. 676; 6 Ves. Jr. 654. n.

67. ANON. case in Moseley's R. 96.

"If an estate is devised to trustees to be sold for the payment of debts, the purchaser need not concern himself to see the money applied; but it is otherwise, if the debts are particularly specified; but

if lands are charged with the payment of debts and legacies, the estate remains charged in whosesoever hands it comes."

Doubted in Gardner et al. v. Gardner et al., 4 Mason's R. 215. Judge Story remarks "From this brief note it is not perhaps easy to decide what is the real meaning of the latter clause; whether that the charge being legacies, as well as debts, the purchaser must look to the application of the purchase-money, a doctrine that cannot now be maintained."

68. ANON. cited by Richards C. B. in Campbell v. Twemlow, 1 Price, 83.

Ld. Kenyon is reported to have refused to admit a woman as a witness for the prosecutor, whom he had in court represented as his wife; but on hearing the objection to her competency taken, denied his marriage with her.

Overruled in Bathews v. Galindo, 4 Bing. 610.

69. ANON. 1 Salk. 126. pl. 6.

This is probably the same case with 1 Salk. 127. pl. 9. and is overruled. Vid. Lambert v. Pack, (post.)

70. ANON. 1 Salk. 126, and S. C. reported as Lambert v. Oaks, Holt's R. 177.

Mistaken report as it appears from 1 Ld. Raym. 443, and note in Salk.; and see Ld. Mansfield's observations in Heylin v. Adamson, 2 Burr. 869; 2 Kenyon's R. 379. Chit. on Bills, p. 530. n. †.

71. ANON. 1 Salk. 278.

The statute of limitations may be given in evidence upon *nil debet*.

Denied by Parsons, C. J. in Pearsall v. Dwight, 2 Mass. 87; Lindo v. Gardiner, 1 Cranch, 344; ib. 465; app. 1 Morg. V. M. 220.

72. ANON. 2 Salk. 413. pl. 2. 4.

Lease for a year, and so from year to year *quamdiu*, &c. adjudged to be a lease for two years, and afterwards at will.

Denied in Birch and Wright, 1 Term R. 380, where these are called "loose notes, jumbled together with others, and not to be relied upon."

73. ANON. 2 Salk. 642.

Overruled in Taylor v. Eastwood, 1 East, 216.

74. ANON. Sav. 70. pl. 145.

Overruled in Doe v. Redfern, 12 East, 113.

75. ANON. in Ventris, 264; there the plaintiff set forth that the defendant

malitiose crimen felonial imposuit; without mentioning any particular felony; and it was held well enough.

Denied in Yundt v. Yundt, 12 Serg. & R. 427—Gibson, J. But in Whiting v. Smith, 13 Pick. 369, it was said, "this case ever has been and still is recognized in the English Courts as good law."—Morton, J. citing Com. Dig. Action on the Case for Defamation D. 4.; 2 B. & C. 283, S. C. 3 D. & R. 519.

76. ANON. 1 Vern. 105.

"I can by no means admit the latitude in the *anon.* case, 1 Vern. 105. or rather that note of a case." Per Ld. Hardwicke, in Dormer v. Fortescue, 3 Atk. 129.

77. ANON. 2 Wils. 135.

Overruled in Rose v. Rowcroft, 4 Campb. 245—Gibbs,—S. P. Dixon v. Evans, 6 T. R. 59: *Held*, that where the petitioning creditor's debt is a bill drawn by the bankrupt, and indorsed to the petitioning creditor, evidence must be adduced that it was indorsed before the suing out of the commission.

78. ANSCOMB v. SHORE, 1 Camp. 290.

In an action by a tenant claiming a right of common over a piece of waste land, against the owner of an adjoining close, for not repairing an intervening fence; the landlord under whom the tenant holds cannot be admitted to prove the right.

Contrary was ruled in Doddington v. Hudson, 1 Bing. 257. in respect to an action by the landlord for an injury to the reversion: the tenant was rejected as a witness.

79. ANTHOINE v. COIT, 2 Hall, 40. Marquand v. Webb, 16 J. R. 89. Osgood v. Manhattan Ins. Co., 3 Cowen, 612. Davis v. Darrord, 12 Wend. 64.

The court will grant a new trial for the cause that improper evidence was admitted, although in the opinion of the court the other evidence was sufficient to uphold the verdict.

Doubted. Crary v. Sprague, et al., 12 Wend. 41.

80. ANTHONY PASQUIN.

Libels published by the plaintiff, were admitted in evidence by Lord Kenyon, in bar of the action.

Denied in Finnerty v. Tipper, 2 Camp. 72, by Sir James Mansfield, who admitted similar evidence in mitigation saying that 'the decision of Ld. Kenyon was incorrect in point of form, though it was correct in point of Justice.' In Child v. Homer et al., 13 Pick. 503, it was held, that distinct and independent libels could not be set off or be given in

evidence in mitigation of damages; but libels which are a part of a connected and continued controversy are admissible in evidence as explanatory of the meaning of the libels complained of, and of the occasion of writing them, in mitigation of damages.

81. APPLETON v. BOYD, 7 Mass. R. 131.

That a witness shall not be required, without his consent, to testify against his pecuniary interest.

Overruled in Bull v. Loveland, 10 Pick. R. 14; Devoll v. Brownell, 5 ib. 448; Taney v. Kemp, 4 H. & J. 348; Stoddart v. Manning, 2 H. & G. 147; Baird v. Cochran, 4 S. & R. 397.

82. APPLETON v. BOYD, *supra.* also S. P. as in Hurd v. West, (post.)

Denied in Gibblehouse v. Strong, 3 Rawle, 451.

83. ARCHBISHOP OF CANTERBURY v. KEMP, Cro. El. 539.

Contradicted by Crogate's case, 8 Rep. 67. vid. also Cockerell v. Armstrong, 2 Com. 582. Jones v. Kitchen, 1 Bos. & Pull. 79.

84. ARCHBISHOP OF DUBLIN v. BRUERTON, 3 Dyer, n. (b.)

A Dean and Chapter may surrender to the King without the consent of the Bishop, and the corporation will be dissolved thereby.

Denied in the Corporation of Colchester v. Seaber, 3 Burr. 1866.

See Slee v. Bloom, 19 J. R. 456; Wilde v. Jenkins, 4 Paige Ch. R. 481.

85. 2 ARCH. PR. 250; 1 Str. 532; 7 T. R. 473.

That a *nolle prosequi* may be entered at any time before judgment, so far as the assessment of damages is concerned and without leave of the court.

Denied in New York, in Love v. Humphrey, 9 Wend. 501, 2. and Backus v. Richardson, 5 J. R. 476; it must be entered before the issuing of the writ of enquiry.

86. ARDEN v. PATTERSON, 5 J. Ch. R. 44.

Doubted, it seems, 2 Story's Com. on Equity, 314. See Thallhimer v. Brinckerhoff, 3 Cowen, 623.

87. ARMISTEAD v. DANGERFIELD, 3 Mumford, 22.

"Where a testator speaks of children, generally, he is to be understood as referring to those, either living at the time of making the testament, or at his death, as circumstances to be collected from his will, may justify."

Denied in Haskins v. Spiller, 1 Dana's R. 72.

88. ARMISTEAD v. PHILPOT, Doug. 231.

If plaintiff cannot find sufficient effects to satisfy his judgment, the court will order the sheriff to retain, for plaintiff's use, money levied in another action, at the suit of the defendant.

Overruled in Fieldhouse v. Croft, 4 East, 510, vid. Turner v. Fendall, 1 Cranch, 117. But in New York the doctrine of Armistead v. Philpot was admitted in Ball v. Ryers, 3 Caines, 84; Vid. 1 Pick. 271.

89. ARNOLD v. SANFORD, 14 John. R. 417.

Judgment of reversal, for error in fact, is *revocatur*. Dewitt v. Post, 11 John. R. 460.

Explained in Camp v. Bennett, 16 Wend. 48.—The judgment of *revocatur* was directed solely upon the authority of Dewitt v. Post, which was a case of error of fact in the same court, and not, like the case then before the court, a case of error in fact in an inferior court." "The judgments of inferior courts are to be *reversed*, whether the error be one of fact or of law."

90. ARTAXA v. SMALLPIECE, 1 Esp. R. 23.

Overruled in Cock v. Taylor, 13 East, 399. Held, that if a Master of a ship contracts by the bill of lading with the shippers to deliver goods to their assigns, he or they paying freight for the same; if the purchaser of the goods take them, this is evidence of a new agreement by him to pay the freight due for the carriage.

91. ASH'S LEGATEES v. ASH'S EXECUTORS, 1 Bay's R. 304.

Doubted in Smith v. Smith, 1 M'C. Ch. R. 148. Nott, J. though not satisfied with that decision; but it has been acted upon as law for 30 years, and ought not to be questioned.

92. ASHBY v. WHITE, 2 Ld. Raym. 928. 1 Bro. Parl. Cas. 49. 1st ed.

Officers appointed to receive the votes of qualified electors, are liable *civiliter* for wilfully denying any elector his right to vote.

In New York, the Supreme Court held, that there must be malice express or implied on the part of the officers. Jenkins v. Waldron, 11 John. R. 120, citing Harman v. Tappenden et al. 1 East, 555. Drewry v. Coulton, ib. 563, note. 1 N. H. R. 88. But see Bridge v. Lincoln, 14 Mass. 367.

93. ASHMAN v. GOLDNEY et al., 2 Stark. Cas. 414, and Blacket v. Wier, 3 B. & C. 385.

Denied in Gregory v. Dodge, 14 Wend. R. 608. Nelson, J.—"are directly opposed to the case of Marquand v. Webbs, (16 John. 89,)" "In the recent case of Ripley v. Thompson, 12 Moore, 55, the two cases above referred to, seem to have been overruled, though it does

not appear from the report they were cited on the argument. The decision there is in conformity to the principle of the decision of the Supreme Court in Marquand v. Webbs. The co-partner who was offered as a witness for the plaintiff, was rejected on the ground that he was interested in procuring a verdict against the defendants, it having been shown that he was himself *prima facie* individually holden for the entire demand; and if collected of them, he would be liable only to contribute his share as partner."

94. ASHTON v. POYNTER, 2 Dowl. Pr. R. 651.

Overruled in Jupp v. Grayson, 3 Dowl. Pr. R. 199; and held, that where a mixed case of law and fact is referred to a non-legal arbitrator, and he decides absolutely upon them without raising any question upon his award, his decision is final, and the Court will not entertain a motion for reviewing such decision, either as to the facts or the law. See also Ching v. Ching. 6 Ves. Jr. 282.

95. ASHTON v. SHEERMAN, Holt, 309. Holt.

"An executor is not liable to pay for funeral expenses unless he contracts for them."

Overruled in Rogers v. Price, 3 Y. & J. 28. Held, "that an executor who has assets sufficient for that purpose, is liable, upon an implied promise, to pay for a funeral, suitable to the degree of his testator, furnished by the directions of a third person."

96. ASLIN v. PARKIN, 2 Burr. 665.

After a judgment by default against the casual ejector, trespass for mesne profits may be brought either in the name of the fictitious plaintiff, or in that of his lessor..

In such an action the judgment in ejectment is evidence of the plaintiff's title and possession from the date of the demise in the declaration in ejectment.

The costs of the ejectment may be recovered as damages.

Smith's Sel. Lead. Cases. 268. n. Remarks thus:

"See Goodtitle v. Tombs, 3 Wils. 118. Although Aslin v. Parkin decides that trespass for mesne profits may be brought, after a judgment by default, in the name of the fictitious plaintiff, still, if it be sought to recover profits antecedent to the day of the demise laid in the previous ejectment, the action should be brought in the name of the real plaintiff, for the title of the fictitious plaintiff exists, of course, only in the proceedings in ejectment, from which it appears to have commenced with the demise there laid. So if the action be brought against an occupier *antecedent* to the ejectment, for as to him the record of the ejectment is no evidence. Decosta v. Atkins, B. N. P. 87. See Hunter v. Britts, 3 Camp. 456; Denn v. White, 7 T. R. 112. Nor will it be evidence in trespass for mesne profits against a person who entered

subsequently to the ejectment, *unless* it be proved that he came in *under* the defendant in ejectment, so as to make him privy to the judgment. Doe v. Harvey, 8 Bingh. 242. But if he came in *under* the defendant in ejectment it will be in evidence. Doe v. Whitcombe, 8 Bingh. 46.

It is stated in Aslin v. Parkin, that "the tenant is concluded by the judgment, and cannot controvert the title;" and this was long considered in practice as *literally* true, although Vooght v. Winch, 2 B. & A. 662; Outram v. Morewood, 3 East, 365; Stafford v. Clarke, 2 Bingh. 381; Hooper v. Hooper, M'Clell. & Young, 509; and Bowman v. Rostrom, 2 Ad. & Ell. 295. show clearly that a judgment is, generally speaking, no estoppel, unless pleaded as such. However, it has been lately decided that there is no difference in that respect between a judgment in ejectment and one in any other action. Doe v. Huddart, 1 C. M. and Rosc. 316.

In Aslin v. Parkin, the costs of the previous ejectment (where judgment, as will be remembered, went by default) were included in the declaration in the action of trespass for mesne profits as special damage. See Doe v. Davis, 1 Esp. 358; Brooke v. Bridges, 7 B. M. 471. In Nowell v. Roake, 7 B. & C. 404, an ejectment was brought in the Common Pleas, and judgment given for the defendant, which was reversed on error. The plaintiff brought trespass for mesne profits in the King's Bench, and recovered the costs in error, *as between attorney and client*, although the Court of Error itself could not have given costs; Bell v. Potts, 5 East, 49; Wyrie v. Stapleton, Str. 615. If the ejectment was defended, the *taxed* costs are recoverable as damages in this action; Doe v. Davis, Symonds v. Page, 1 C. & J. 29; but no *extra* costs are so. Doe v. Davis, 1 Esp. 358; Brooke v. Bridges, 7 B. M. 471; Doe v. Hare, 2 Dowl. P. C. 245.

In estimating the damages, the jury are also allowed to take into consideration the trouble and inconvenience sustained by the plaintiff, in consequence of the defendant's trespasses, over and above the mere rent of the premises, so as completely to compensate him for the injury he has sustained. Goodtitle v. Tombs, 3 Wils. 121. This action could not formerly have been brought against, or by, an executor or administrator, the rule *actio personalis moritur cum persona* being applicable to it. But by 3 & 4 W. 4, c. 42, s. 3, it now may, provided it be brought within six months after the defendant shall have taken administration on himself, and provided the trespasses were committed within six months before the death of the trespasser; and by the same section it may be brought by an executor, provided the trespasses were committed within six months before the death, and the action be commenced within a year after the death. By the same statute, money may be paid into court, in such an action, under a Judge's order.

When the action is brought, as in Aslin v. Parkin, in the name of a

fictitious plaintiff, the court will stay proceedings, until security be given for the defendant's costs, otherwise he would have no means of recovering them: B. N. P. 89.

It is remarked in Aslin v. Parkin, that as to the length of time the defendant has been in possession, the judgment in ejectment proves nothing; the consent rule, however, where there is one, may be put in, and will show the defendant to have been in possession at the time of the service of the declaration in ejectment. Doe v. Gibbs, 2. C. & P. 615."

97. ASSIEVEDO v. CAMBRIDGE, 10 Mod. 77.

Approving of a wager policy.

Denied; Amory v. Gilman, 2 Mass. Rep. 1.

98. ASTLEY v. REYNOLDS, 2 Stra. R. 916.

An action was sustained to recover back money extorted by a pawnbroker, for the redemption of plate; notwithstanding it was objected that payment was voluntary.

Overruled in Knibbs v. Hall, 1 Esp. 84, Ld. Kenyon. Hall v. Schultz, 4 John. R. 240, Spencer, J. But in Chase v. Dwinal, 7 Greenl. R. 138, Weston, J. says, "His lordship does not advert to the case of Astley v. Reynolds; and subsequently in Cartwright v. Rowley, (2 Esp. 723), he refers with approbation to an action within his recollection, for money had and received, brought against the steward of a manor, to recover money paid for producing at a trial some deeds and court rolls, for which he had charged extravagantly. It was urged that the payment was voluntary; but it appearing that the party could not do without the deeds, and that the money was paid through the urgency of the case, the action was sustained." Money illegally or wrongfully exacted; and payments thus coerced are not to be deemed voluntary, but extorted and compulsory: *ib. and cases cited.*

99. ASTLEY v. WELDON, 2 Bos. & P. 354.

Oppo. Pierce v. Fuller, 8 Mass. 223.

100. ASTOR v. MILLER et al., 2 Paige's Ch. R. 68.

Reversed in 5 Wend. 619.

101. ASTOR v. WHITEHALL, Cro. Eliz. 57.

Doubted in Carris v. Ingalls, 12 Wend. 73. Nelson—"The report of that case is very obscure, and it is difficult to understand precisely the opinion of the judges upon the point, except that nothing was definitely determined."

102. ATKIN v. BARWICK, 1 Str. 165.

Ld. Mansfield, in Harman v. Fisher, Cowp. 125 said—"The judgment seemed to be right, but the reasons wrong." (1 Mo. & P. 523, 527 acc.)

103. ATKINS v. HILL, and HAWKS v. SAUNDERS, Cowp. 284. 289.

That an action of assumpsit lay at law against an executor, on his express promise to pay a legacy, in consideration of assets received, sufficient to pay all the debts and legacies.

Shaken by Deeks v. Strutt, 5 T. R. 600; 8 ib. 593: but Kent, C. J. in Beecker v. Beecker, 7 J. R. 104, says 'that there never was any settled course of decisions against the action; and when the devisee, or ter-tenant, affirms the trust, by accepting of the land, and promising to pay, the cases comes within the principle of the cases decided by Ld. Mansfield; for it is a contract founded upon a valuable consideration.' See 18 J. R. 429.

104. ATKINS & ux v. HILL, Cowp. 288, 9; Hawkes & ux v. Saunders, Cowp. 290; Trueman v. Fenton, Cowp. 544; Atkins v. Barnwell, 2 East, 505; Lee v. Muggeridge, & al. 5 Taunt. 36. That a moral obligation is alone a sufficient consideration to support a contract.

Oppo. Cook v. Bradley, 7 Conn. 64; Mills v. Wyman, 3 Pick. 207; Smith v. Ware, 13 John. 257. 289; Edwards v. Davis, 16 ib. 283. n.—3 Bos. & Pul. 249. note.

105. ATKINS' REPORTS. *Temp. Hardwicke.*

——— "is a book which, of late, has often been questioned." 2 Woodd. Lect. 362. "It was the misfortune of Ld. Hardwicke, and of the public in general, to have many of his determinations published in an incorrect and slovenly way." Per Buller, J. in Lickbarrow v. Mason, 6 East, 29 in note. "Extremely inaccurate." Per Mansfield, C. J. 5 Taunt. 64.

106. ATTORNEY GENERAL v. ANDREW, Hard. 23.

Doubted in Giles v. Grover, 1 Clark & Fin. R. 82. 196.—Patteson.

107. ATTORNEY GENERAL v. BOWLES, 2 Ves. 547; 3 Atk. 806.

"The authority of this case has been shaken; and it is one of Ld. Hardwicke's decisions that I cannot entirely concur in." Per Sir P. Arden in Attorney-General v. Whitechurch, 3 Ves. Jr. 141. And see Belt's Supplement to Ves. R. 404. S. P.

108. ATTORNEY GENERAL v. BULPIT, 9 Price, 4; S. P. Wyld's case, 6 C. & P. 380.

In the Exchequer, the rule is inflexible, that if a witness remain in court after an order made for the witness to withdraw, he shall not afterwards be allowed to be examined.

Oppo. Parker v. M'William, 6 Bing. 683; R. v. Colley, Moo. & Malk. 329.—Bayley and Holroyd, J's. S. P. State v. Sparrow, 2 Murph. 487.

109. ATTORNEY GENERAL v. CLEAVER, 18 Ves. 220.

Ld. Eldon appeared to think that there was no instance of an injunction to restrain a nuisance without a trial.

Overruled in Earl of Ripon v. Hobart, 3 M. & K. 169. (8 Cond. 331.)

110 STAUNTON v. OLDHAM, 2 Atk. 383.

That a decree for an account is never enrolled.

Denied in Parker v. Downing, 1 Coop. Sel. Cas. 148. (8 Cond. 418.)

111. ATTO. GEN. *ex rel.* GOLDSMITH'S CO. v. HALL, Fitzgibbon's R. 314.

Better reported in 2 Equ. Cas. Abr. n. See also 1 Tamlyn, (5 Cond. 458. n.)

112. ATTO. GEN. v. The GOV. & CO. of C'. W. W. Fitz. 196.

Oppo. Steel v. Smith, 1 B. & Ald. 94.

113. ATTO. GEN. v. HEELIS, 2 Sim. & Stu. 76, contains some general doctrines which Lord Eldon would not have subscribed to in its full extent. Atto. Gen. v. Mayor, &c. Galway, 1 Moll. Ch. R. 110.

114. ATTO. GEN. v. JONES, 3 Price, 368.

Held by three judges against Wood, B. that a voluntary deed, assigning leasehold and personal estate, under which the grantor was entitled for life, with a power of revocation, and which he confirmed by his will, was a testamentary instrument within the stamp-act.

Denied in Sugd. on Pow. 275, n. (1).

115. AUSTIN v. SAWYER, 9 Cowen, 39.

Denied in Whitaker v. Brown, 8 Wend. 492, where Sutherland, J. says, "The question as to the declarations of the vendor, does not appear to have been raised," &c. "The reporter, therefore, has fallen into an error, when he declares in his marginal note, that that case overrules the case of Hurd v. West, 7 Cowen, 752."

116. AUSTIN v. WHITE, Cro. El. 214.

Charge of having had a contagious disorder held good.

Denied in Carslake v. Mapledoram, 2 Term R. 473.

117. AVESON v. LORD KINNARD, 6 East, 188.

Doubted in White v. Holman, 3 Fairf. R. 157, Weston, C. J. after

stating the peculiar circumstances of that case, observes, "In our opinion, no general principle can be extracted from a case, so peculiar in its character."

118. AVERY et al. v. STEWART et al., 2 Conn. 69.

That if a note payable in collateral articles falls due on Sunday, payment should be made on Monday.

Denied in S. C. by two Judges. Per Savage, C. J. in 8 Cowen, 30.

119. AYER v. ADEN, Yelv. 44.

Misreported. Vid. Cro. Jac. 73; Moor, 757; Wilbraham v. Snow, 2 Saund. 47.

120. AYLETT v. JEWELL, 2 Bl. R. 1299; Willes, 487.

Overruled in Kightly v. Birch, 2 M. & Selw. 533.

121. AYMAR v. ASTOR, 6 Cowen, 266.

Overruled in Allen v. Sewall, 2 Wend. 327; and Sewall v. Allen, 6 Wend. 335. S. C. Held, that steam boat proprietors were not liable as common carriers in respect to bank bills unless the carriage of such bills was a part of their business; however, in general there is no distinction between carriers by land and by water.

122. BACK v. KETT, Jac. 534.

Tends to support the position that "all my estates which I shall die possessed of," is the same as, "all my estates, which, being now mine, shall be mine till my decease;" in other words, "all my estate on which my will can operate."

Denied in Churchman v. Ireland, Russ. & Myl. 250. (4 Cond. Eng. Ch. R. 412.)

123. BACK v. OWEN, 5 Term 409.

"There was no judgment however in that case." Ld. Ellenborough, 10 East, 364.

124. BACKSTER'S CASE, cited in Cro. Jac. 430.

Charge of having had a contagious disorder, held actionable.

Denied in Carslake v. Mapledoram, 2 D. & E. 473.

125. BACKUS' ADM. v. M'COY, 3 Ham. (Ohio) R. 211.—S. P. as in Kingdon v. Nottle, (post.)

126. BACON'S ABR. (tit. Leases, (C) p. 13.)

That if a husband seized of lands, in right of his wife, makes a lease thereof by indenture, or deed-poll, reserving rent, that is a

good lease for the whole term, unless the wife, by some act after the husband's death, shows her dissent thereto; for if she accepts rent that becomes due after his death, the lease thereby becomes absolute and unavoidable.

Doubted by Thompson, J. in Jackson v. Holloway, 7 J. R. 85.

127. 6 BAC. ABR. TRESPASS, (C) pl. 3. p. 566.

That the disseisee of land cannot maintain an action of trespass *quare clausum fregit*, for an injury done thereto, betwixt the time of disseisin, and his re-entry."

Denied in Dewey v. Osborn, 4 Cowen, 538:—"if it be of the disseisor as well as strangers, clearly it is not law." Acc. 8 Cowen, 222, and 2 Roll. Abr. Trespass (T) pl. 5.

128. BACON v. PAGE, 1 Conn. R. 404.

That the plaintiff should declare on a contract according to its *legal effect*, and not on the *evidence* of the contract.

Oppo. Okie v. Spencer, 2 Whart. R. 253. 260.—Herrick v. Bennett, 8 John. 374.

129. BACON v. WALTER, 1 Roll. Rep. 387; 3 Bulstr. 204; Co. Lit. 46. b.

That "from the date," and "from the day of the date," mean both the same thing, and that both are exclusive.

Agreed that they both mean the same thing; but resolved that, "from" may mean inclusive, or exclusive, according to the subject matter; and that it should be so construed as to effectuate the deeds of parties, not to destroy them. Pugh v. D. of Leeds, Cowp. 714; vid. Presbrey v. Williams, 15 Mass. 193.

If a note be payable in certain days from the date, the day of the date is exclusive. Henry v. Jones, 8 Mass. 453.

130. BADGER v. PHINNEY, 15 Mass. R. 359.

It was held that replevin lies for goods unlawfully detained, though there was no tortious taking.

Decided differently in Marshall v. Davis, 1 Wend. 109; Gardner v. Campbell, 15 J. R. 402; Meary v. Head, 1 Mason, 322.

131. BAGE v. BROUMEL, 3 Lev. 99.

Overruled in Kightly v. Birch, 10 East, 533, Ld. Ellenborough C. J. saying "that the case referred to had had its day, and that it was time it should cease."

132. BAGG'S CASE, 2d resolution, 11 Rep. 99.

From the second resolution in this case it has been collected that a

corporation has no power of amotion, unless given by charter or prescription.

But this position is denied in Rex v. Richardson, 1 Burr. 539, where it is holden that the power of amotion for good cause is incident to every corporation, as much as the practice of making by-laws. Vid. also Lord Bruce's case, 2 Str. 819.

133. BAGLEY v. MOLLARD, 1 Rus. & Myl. 581.

Whenever the general description of *children* in a will would include legitimate children, it cannot also be extended to illegitimate children.

Doubted, in 4 K. Com. 413. n. (c). See also Beachroft v. Beachroft, 1 Madd. R. 234. Cooley et al. v. Dewey et al., 4 Pick. 93.

134. BAGOTT v. ORR, 2 B. & P. 472.

Prima facie every subject has a right to take fish found upon the sea-shore between high and low water mark; but such general right may be abridged by the existence of an exclusive right in some individual.

Overruled in Blundell v. Catterall, 5 B. & Ald. 267.

135. BAGSHAW v. SPENCER, 1 Ves. 142; 2 Atk. 346.

Denied in Wright v. Pearson, 1 Eden R. 129 note. See 4 K. C. 218, 219.

136. BAILEY v. BUNNING, 1 Sid. 271; 1 Lev. 173.

Denied in Cooper v. Chitty, 1 Burr. 35. Ld. Mansfield; "Siderfin does not seem to know what the court was going upon." Bolland, B. (3 Tyrwh. R. 715. 734) "It must be admitted the report is imperfect in some particulars, but as to the grounds of the judgment Siderfin agrees with Levinz; and it is material to observe, that in the report of Philips v. Thompson, in C. B. by Levinz, in his third volume, 198, the judges in noticing Bailey v. Bunning, stated that that was decided solely in excuse of the bailiff, who ought to be excused for executing the writ, and not on the ground that the goods were bound by the writ; and it must not be lost sight of in estimating the weight to be given to the reports in the third volume, that they are reports of cases determined during the time that Levinz was a judge of the court of common pleas, and of others which were decided after he was removed from the bench. It appears, therefore, that Bailey v. Bunning may be relied on as an authority, that in the case of an officer an act would be lawful, which if done by an ordinary person would be an unlawful taking, and subject the doer to an action of trover."

137. BAILEY v. CULVERWELL, 2 Mann. & Ry. 566. note. (See Com. Dig. Biens, D. 3.)

The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery is questioned.

Denied in Dixon v. Gates, 5 B. & Ad. 313,—Parke:—"But I apprehend the rule is correct as confined to a bargain for a special chattel."

138. BAILEY v. NICKOLS, 2 Root, 407.

Held that the law implies a warranty that the thing sold is what it is held out to be; and if it is not, the seller must make good the damage, whether he knew of any defect or not.

Contrary to Pickering v. Dowson, 4 Taunt. 779; Emerson v. Brigham, 10 Mass. 197.

139. BAINBRIDGE v. NEILSON, 10 East, 345.

An offer to abandon a ship, though rightly made at the time, may yet be defeated by the subsequent events; the principle is that no artificial reasoning shall turn that into a total loss, which in fact is but partial. An abandonment being this, that the assured having had notice of circumstances, which, if true, entitled him to treat the adventure as a total loss, he, in contemplation of those circumstances, casts a desperate risk on the underwriter, who is to save himself as well as he can. "The principle is a general one, and is this, (said Ld. Ellenborough in Patterson v. Ritchie; 4 M. & S. 397): I have a right of action for non-payment of money; the party pays me before action brought; that takes away my right of action."

Doubted in Smith v. Robertson, 2 Dow. 474—Lord Eldon. "But notwithstandiug those doubts, the rule as laid down in Bainbridge v. Neilson was adopted and acted upon in the two subsequent cases of Patterson v. Ritchie, 4 M. & S. 393, and Brotherson v. Barber, 5 M. & S. 418. We consider the point to have been well settled, and the rule established by these authorities." Per Ld. Tenterden, C. J. in Naylor v. Taylor, 9 B. & C. 718. See also Peele v. Suffolk Ins. Co. (post.) But in the U. S. in general, there is a difference between the courts of this country and those of England, in respect to the right of abandonment. "With us, an abandonment once rightfully made, is conclusive between the parties, and the rights flowing from it are not divested by any subsequent events, which change the situation of the property, and make that, which was a total loss at the time of abandonment, a partial loss only. And the right of abandonment is to be decided by the actual state of facts at the time of the abandonment, and not merely by the information of the assured; and consequently, if the facts do not then warrant it, no prior or subsequent events will give it any greater efficacy." Per Story, J. in Peele v. The Merchants' Ins. Co., 3 Mason, 27. *and cases cited.* But see the later case in Peele v. Suff. Ins. Co. (post.) and also 3 K. C. 324, n. (c).

140. BAKER et al. v. ARNOLD, 1 Caines' R. 258.

Explained in Brandt v. Klein, 17 John. R. 338. By the court:—"The case of Baker et al. v. Arnold, 1 Caines' R. 25, is not an authorit eiter way, on the question as to what facts an attorney or counsel may testify, when called on as a witness."

141. BAKER v. BERISFORD, 1 Sid. 76.

Ld. Kenyon spoke slightly of this case, in Cutts v. Vernon, 3 D. & E. 589.

142. BAKER v. CHILDS, 2 Vern. 61.

Denied in 1 Eq. Cas. Abr. 62. pl. where it is said "that upon looking into the register's minutes, it appeared that the court made no decree in it; but it was, by consent, referred to Mr. Serjt. Rawlinson for his arbitration." And Sutherland, J. in Martin v. Dwelly, 6 Wend. 15. "It is altogether too loose and bald a case to be entitled to any consideration.

143. BAKER v. FALES, 16 Mass. 147; Badger v. Phinney, 15 ib. 359.

As to the right to maintain replevin in cases of wrongful detention.

Oppo. Thompson v. Button, 15 J. R. 401, (post.)

144. BAKER v. The State of MARYLAND, (1806) cited in 5 H. & J. 234.

Denied in Queen v. The State, 5 H. & J. 232, 234:—"In the case of Baker v. The State of Maryland the propriety of allowing a bill of exceptions in a criminal case was not considered by the court; it passed *sub silentio*, and therefore is not an authority in this case."

145. BALBI v. BATLEY, 6 Taunt. 25; 1 Marsh. 424; Humphries v. Winslowe, 6 Taunt. 531; 2 Marsh. 231; M'Taggart v. Ellice, 2 J. B. Moore, 326; 4 Bing. 114; Lewis v. Gompertz, 2 Cr. & Jerv. 352; 1 D. P. C. 319; Woolley v. Escudier, 2 Mo. & Scott, 356.

Oppo. Bradshaw v. Saddington, 7 East, 94; 3 Smith, 117 and Mammat v. Mathew, 4 Mo. & Scott, 357, and cases cited p. 357 n. (c). An affidavit stating that defendant "was justly indebted to the plaintiff in 100*l.*, upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid;" without stating in what character the bill was due to the plaintiff, whether as payee or indorsee; and it was held sufficient.

146. BALDWIN v. COLE, 6 Mod. 202.

A demand and refusal is in itself a conversion.

Denied in Irish v. Cloyes et al. 8 Verm. R. 30.

147. BALMAIN v. SHORE, 9 Ves. 500.

S. P. as in Thornton v. Dixon, (post.)

148. BELL v. PHYN, 7 Ves. 453.

S. P. as in Thornton v. Dixon ; (post.)

149. BALMANNO v. LUMLEY, 1 Vesey & Beame, 224.

Corrected in Bonner v. Johnstone, 1 Merivale R. 372, and see Hartford v. Purrier, 2 Maddock Ch. R. 532, 533. note.

150. BALME v. HUTTON, 2 Tyr. 17; 2 C. & J. 19; 2 Y. & J. 101.

Reversed in S. C. 3 M. & Scott, 1; 9 Bing. 471 ; 1 C. & M. 262; 2 Tyr. 620. Held, where the sheriff seized the goods of a defendant under a *fi. fa.* and sold and delivered them to the judgment creditor, in satisfaction of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him:— Held, that the seizure and sale of the goods was a wrongful conversion, for which the sheriff was liable in an action of trover at the suit of the assignees subsequently chosen.

151. BANDAL'S CASE, (Noy, 21.)

Appears to consider the execution of a writ of inquiry as a judicial act.

Denied in Tillotson v. Cheetham, 2 John. R. 72, 3.—Kent, C. J.— "Noy's Reports are of no credit; they being according to Mr. Hargrave, only loose notes, compiled from his papers, by Serjeant Size, and imposed upon the world as genuine. But the case itself is solitary and anomalous, and cannot be law."

152. BANK of AMERICA v. WOODWORTH, 18 John. R. 315.

Reversed in Woodworth v. Bank of America, 19 John. R. 390, 1; deciding that if no place of payment be named in the note, the holder must make a demand of the maker personally, or at his *residence.*

153. BANK OF LIMESTONE v. PENICK, 5 Mon. R. 25. 31.

Any alteration, however immaterial, in a promissory note, if made by the promisee without consent, renders the note a nullity.

Doubted. Vide Hunt v. Adams, 6 Mass. 522; Nichols v. Johnson, 10 Conn. 197; 2 Phil. Ev. 6, 7; Smith v. Crocker, 5 Mass. 538; Hatch v. Hatch, 9 ib. 307; Saunderson v. M'Cullom, 4 J. B. Moore, 5; Tappan v. Ely, 15 Wend. 362.

154. BANKS v. SUTTON, 2 P. Wms. 700.

Sir Jos. Jekyll, ruled, that a widow should be endowed of an equity of redemption, though the mortgage was made in fee before the marriage, upon her paying a third of the mortgage money, or keeping down a third of the interest.

Overruled in Chaplin v. Chaplin, 3 P. Wms. 229. D'Arcy v. Blake, cho. & Lef. 387.

155. The BAPTIST ASSOCIATION v. HART, 4 Wh. R. 1.

In respect to a gift for charitable purposes.

Doubted it seems in The Orphan Asylum v. M'Cartee, 9 Cowen, 437, in respect to the principles there advanced. See also 2 K. C. 286 *et seq.* and p. 287 n. (b).

156. BAPT. SOCIETY v. WILTON, 2 N. H. R. 508—510.

The rights reserved by charter for the support of the ministry, and for the support of schools, are regarded simply as appropriations in aid of the respective towns, and subject to their unqualified control and disposition:—and therefore liable to be sold, and converted into other funds, at the discretion of the town.

Oppo. Burk v. Whitney, 1 Chip. R. 369. Lampson & Barnum v. New Haven, 2 Verm. R. 14.—Williams v. Goddard, 8 ib. 492.

157. BARBER v. BARBER, 18 Ves. 280; S. P. as in Martin v. Heathcote.

Denied in M'Clellan v. Crafton, 6 Greenl. 346.

158. BARBER v. FLETCHER, 1 Doug. 305.

A representation made to the first underwriters, extends to all others.

Doubted in Marsden v. Reid, 3 East, 572. And see Bell v. Carstairs, 14 East, 374; 2 Camp. 544; 4 Taunt. 869.

159. BARBER v. SUTTON, cited 1 Compt. 55.

Where the plaintiff having sold 60 comb of rye, to the defendant, to be delivered before Michaelmas, and having delivered 50 comb, brought his action for the part delivered, held by Hale C. B. that though the agreement was entire, the several deliveries made several contracts.

Denied in M'Millan v. Vanderlip, 12 J. R. 165. Spencer, J. saying "it was a very unreasonable decision."

160. BARCLAY v. GOOCH, 2 Esp. 571.

Doubted and shaken since Taylor v. Higgins, 3 East, 169. See also Maxwell v. Jameson, 2 B. & A. 51.

161. BARCLAY v. LUCAS, 1 D. & E. 291, n.

Bond for fidelity of banker's clerk: plea, introduction of new partner into the firm: and held bad: for that the bond was to the house, and not to the persons of the partners.

"The propriety of this decision has been very much questioned." Per Mansfield, C. J. in Weston v. Barton, 4 Taunt. 673. vid. Ld. Arlington v. Merrick, 2 Saund. 411. Williams' ed. note (5).

162. BARCROFT'S CASE Aleyne, 22.

Doubted in Story on Bail, 339.

163. BAREWELL v. BROOKS, H. 24 G. 3, B. R.
Overruled in Marshall v. Rutton, 8 T. R. 545.

164. BARKER v. DIXIE, Cases *temp.* Hard. 264.

Ld. Hardwicke, (civil case) refused to permit the plaintiff's wife to be examined, though with the consent of the defendant.

Overruled in Pedley v. Wellesley, 3 C. & P. 558, it would seem, though the case was not cited.

165. BARKER v. PRENTISS, 6 Mass. R. 430.

Parsons, C. J. states the law to be, that as between the original parties, parol evidence may be received to contradict a written simple contract; and to show that there existed limitations and conditions, not reduced to writing.

Overruled in Cunningham v. Wardwell, 3 Fairf. R. 470, and *cases cited*—Weston, C. J. See Hunt v. Adams, 6 Mass. 519; 7 ib. 518.

166. BARNADISTON'S REPORTS, B. R.

Ld. Mansfield in dispraise, 2 Burr. 386.—"Not much authority." Doug. 333, n.—"Of still less authority than 10 Mod." Doug. 689.—"A bad reporter," per Ld. Kenyon, 1 East, 642, n. Lord Lyndhurst.—"Barnadiston, Mr. Preston! I fear that is a book of no great authority; I recollect, in my younger days, it was said of Barnadiston, that he was accustomed to slumber over his note-book, and the wags in his rear took the opportunity of scribbling nonsense in it." Mr. Preston.—"There are some cases in Barnadiston which, in my experience, and having had frequent occasion to compare that reporter's cases with the same cases elsewhere, I have found to be the only sensible and intelligent reports, and I trust I shall show your lordship that it may be said of Barnadiston, *non omnibus dormio.*" C. B. Alexander used to praise him highly. Gres. Eq. Ev. 301, n.

167. BARNADISTON'S CHANCERY CASES.

Lord Eldon said (1 Bligh's R. 538):—"I am old enough to remember Lord Mansfield, who practised under Lord Hardwicke, by whom all these cases were decided, state his opinion of these reports, for he knew the man. I take the liberty of saying that in that book there are reports of very great authority."

168. BARNES' NOTES.

"Many of the cases reported in that book are not law." Per Heath, J. in 3 B. & P. 245. Buller, J. said (1 B. & P. 333, 4.) he "has indeed in general reported the practice of the court with accuracy."

169. BARNES v. HEDLEY, 1 Camp. R. 157.

If money is lent at usurious interest, a subsequent contract to repay the principal with legal interest is void under 12 Ann. c. 16, s. 1.

Overruled in 2 Taunt. 184; Wright v. Wheeler, Peake's C. 175. Selw. N. P. 568. See also, Peake's C. p. 179, n.

170. BARNES v. TROMPOWSKY, 7 T. R. 261.

That the subscribing witnesses are agreed upon between the parties to be the only witnesses to prove the instrument.

Denied in Hall v. Phelps, 2 J. R. 451; Abbot v. Plumbe, Doug. 206; Jackson v. Burton, 11 J. R. 64, and Homer v. Wallis, 11 Mass. 64.

171. BAROUGH v. WHITE, 4 B. & C. 325—2 Phil. Ev. 19.

A negotiable note payable on demand is a continuing security, and is not overdue without evidence of payment having been demanded and refused.

Oppo. Sylvester v. Crapo, 15 Pick. 92.

172. BARRERA v. ALPUENTE, 6 Mart. Lou. R. 69. N. S.

The laws of the domicil of origin govern the state and condition of the minor in whatever country he removes: as a person born in Louisiana will be of age at 21, although removed to Spain where minority does not cease until 25.

Denied. See 2 K. C. 232. n. and cases cited.

173. BARRET v. GLUBB, Bac. Abr. Simony, A.

Inaccurately reported, and some of its expressions doubted. Greenwood v. Bishop of London, 5 Taunt. 727.

174. BARROW v. RHINELANDER, 1 J. Ch. R. 550.

Reversed in 17 J. R. 538.

175. BARRY v. BUSH, 1 Term 691.

The administrator was held to be precluded from denying that he had assets, because by the terms of the submission he had bound himself to pay or the arbitrator had ordered him to do so.

Overruled in Pearson v. Henry, 5 Term, 6; and Grace v. Sutton, 5 Watts, 542; Hoare v. Muloy, 2 Yeates, 161.

176. BARTELOT v. HARSKEW, Peak. 7.

S. P. as in Hodges v. Windham, (post.)

177. BARTLETT v. KNIGHT, 1 Mass. 401.

That a judgment of a court of another of the United States is not in all cases conclusive evidence of a debt, in an action brought thereon in Massachusetts.

Overruled in Bissel v. Briggs, 9 Mass. 462; where it is holden that in such action of debt nothing is open to inquiry except the jurisdiction.

178. BARWELL v. BROOKS, 24 G. 3.

Overruled in Marshall v. Rutton, 8 T. R. 545:—Held, that a feme covert cannot contract and be sued as a feme sole, though she live apart from her husband and have a separate maintenance secured by deed.

179. BASS v. CLIVE, 3 M. & S. 283.

Before applying to the Court to compel a party to give security for costs, application should be made to the party.

Overruled in Baillie v. De Bernales, 1 B. & Ald. 331. But Adams v. Brown, 9 Bing. 81; upholds the former case, as the better practice.

180. BASS v. MAITLAND, 8 J. B. Moore, 44.

Doubted in King v. Packwood, 2 Dowl. Pr. R. 570:—Held, that where a demand is made of money, pursuant to the master's *allocatur*, by or under the authority of a power of attorney, a copy of the power must be left with the defendant in order to bring him into contempt for nonpayment.

181. BATES v. TYMASON, 13 Wend. 303.

Reversed in Tymason v. Bates, 14 Wend. 671.

182. BAWDEROCK v. MACKALLER, Cro. Car. 330.

Overruled in Lloyd v. Williams, 3 Wils. 262.

183. BAWDES v. AMHERST, 1 Eq. Ca. Ab. 21.

Lord Chan. Cowp. said, "he knew of no case where an agreement, though wrote by the party himself, should bind, if not signed, or in part executed by him."

Denied in Higdon v. Thomas, 1 Maryland R. 148.—Dorsey, J.:—"if received with the meaning usually ascribed to it, viz. that a formal signature is necessary, is contradicted by Lemayne v. Stanley, 3 Lev. 1. Knight v. Crockford, 1 Esp. R. 190; Saunderson v. Jackson, 2 B. & P. 238, and Ogilvie v. Foljambe, 3 Meriv. 52; and is denied to be law by Lord Hardwick, in Welford v. Beazely, 3 Atk. 503, and its repudiation has been sanctioned by all subsequent writers upon the subject."

184. BAXTER v. PENNIMAN, 8 Mass. R. 134.

Denied in Peck v. Bottsford, 7 Conn. R. 180; by Daggett, J.—"So far as that opinion regards an acknowledgment *by* an executor or administrator, the case did not call for it, and it was entirely *obiter*."

185. BAY v. FREAZIER, 1 Bay, 66.

Held that where a bond had been assigned for value received, making its contents payable to the assignee or order, the assignee might maintain an action against the assignor, as on a bill of exchange drawn on the bond.

Overruled in Walker v. Scott, referred to in Twitty ads. Todd, 1 Nott & M'Cord, 261; Pratt & Moore v. Thomas, 2 Hill's R. 656; Benton v. Gibson, 1 Hill, 56; Wilson v. Mullen, 3 M'C. 236; Parker v. Kennedy, 1 Bay, 398.

186. BAYARD v. HOFFMAN, 4 J. Ch. R. 450.

A creditor may be entitled to the aid of the chancellor to subject *a chose in action* to the satisfaction of a judgment; and that a donee of such an in interest might at common law have been subjected to a liability for its value.

Denied in Doyle v. Sleeper, 1 Dana, 534, 5. Buford v. Buford, 1 Bibb. 305.

187. BAYARD v. MALCOLM, 1 John. R. 453.

Reversed in S. C. 2 John. R. 550.

188. BAYLEY ON BILLS, 163.

That a bill is *prima facie* evidence of money had and received by the drawer to the use of the holder, or of money paid by such holder to the use of the drawer.

Doubted in 2 Phill. Ev. 15, and 2 Stark. Ev. p. 184, 5. *Sed* in Wild v. Fisher, 4 Pick. 421, held, that in an action by indorsee against the maker, the note was evidence under the money count.

189. BAYLEY v. BUNNING, 1 Sid. 272.

Ld. Mansfield said this case was best reported in Levinz: and that "Siderfin does not seem to know what the court was going upon." 1 Burr. 35. See also 3 Lev. 192.

190. BAYLEY v. MERRILL, Cro. Jac. 196.

The plaintiff, a carrier, was injured by giving credit to the false affirmation of the defendant, that a quantity of madder, which weighed twenty-two hundred, was only of the weight of eight hundred pounds, for which it was held that no action could be sustained.

Overruled in Bean v. Herrick, 3 Fairf. R. 262. See Pasley v. Freeman, (post). Tapp v. Lee, (post.) Turner v. Harvey, Jacob's R. 178.

191. BAYNHAM v. MATTHEWS, 2 Str. 871.

Denied in Robinson v. Raley, 1 Burr. 321—Dennison, J.; and in Hedges v. Sandon, 2 Term 459, overruled.

Overruled in Lewis v. Pottle, 4 T. R. 570.

208. BELL v. CARSTAIRS, 14 East, 385—Ellenborough.

That there was *no warranty of documentation.*

Doubted. See Pipon v. Cope, 1 Cowp. 434, n.; and Smith's Mer. L. p. 236. (Am. ed. p. 142) n. (q).

209. BELL v. MORRISON, 1 Pet. R. 371.

Held, that an acknowledgment of one partner after the dissolution of the partnership, not sufficient to take it out of the statute.

Oppo. Greenleaf v. Quincy, 3 Fairf. R. 11, and cases cited by Weston, C. J.

210. BELL v. REED, 4 Binn. 127.

Doubted in Hart v. Allen, 2 Watts, 118—Gibson :—"I confess that I am unable to comprehend the relevancy, or feel the force of Mr. J. Breckenridge's remarks in Bell v. Reed, that 'where the owner insures his ship, he remains his own carrier; and the undertaking of the *third* person, is that the ship shall perform the voyage safely. But it is implied in the undertaking, that the owner, the carrier, shall provide a sufficient vessel; and where the insurance is on goods, it is implied that they shall be taken on board of a sufficient vessel.'"

211. BELL v. WARDELL, Willes, 204.

Ch. J. Willes said, that "the general replication of *de injuria sua propria*, &c. was bad, when it puts several distinct points in issue; whereas the end and use of special pleading is to reduce matters to a single point."

Overruled in Selby v. Bardons, 3 B. & Ad. 2.—Patteson and Parke. Ld. Tenterden, dissenting.

212. BELLASIS v. BURBRICK, cited in 2 Salk. 413, pl. 2.

That a lease for a year, and so from year to year, during pleasure of the parties, was a lease for two years, and afterwards at will only.

Denied Per Buller, J. in Birch v. Wright, 1 D. & E. 380. It is better reported in Lutw. 213.

213. BENNET'S CASE, Cro. Eliz. 9.

Overruled in Manser's case, 2 Co. 3, a. S. C. 4 Leon. 62.

214. BENNETT v. FARNELL, 2 Cowp. 130.

Ld. Ellenborough held that a bill of exchange payable to a fictitious person or his order, is in effect void.

Oppo. Allen v. Hunter, Peake's Cases, 146, and cases cited.

215. BENNETT v. READ, 4 Gwill. 1279.

Distinguished and reconciled in Blackburn v. Jepson, 3 Swans. R. 152.

216. BENSON v. PARRY, cited 2 D. & E. 52.

"Long since overruled." Per Vice Chancellor in Ex Parte Henson, 1 Madd. Rep. 112.

217. BERTHON v. LOUGHMAN, 2 Stark. N. P. 288.

Holroyd, J. permitted a witness, who was coversant with the business of insurance, to give his opinion as a matter of judgment, whether the communication of particular facts would have enhanced the premium.

Denied in Durnell v. Bederly, 1 Holt's N. P. C. 283; acc. also 7 Wend. 79.

218. BESWICK v. SWINDELLS, 5 B. & Ad. 914; 3 N. & M. 159.

Was affirmed on error in Ex. 5 N. & M. 378.

219. BETTISON v. FARRINGTON, 3 P. Wms. 363.

Subsequent cases appear to question the doctrine of this case on both its points. Per Ld. Eldon in the Princess of Wales v. Earl of Liverpool, 1 Swanst. R. 114. 121. See Hardman v. Ellames, 2 M. & K. 759. (8 Cond. Ch. R. 215.)

220. BETTS v. KIMPTON, 2 B. & Adol. 273.

The administrator of a husband who survived his wife, and died without taking out administration of her effects, could not recover her choses in action. For that purpose administration must be taken out to the wife.

Overruled, *it seems*, in Fielder v. Hanger, 3 Hagg. E. C. R. 769: Administration *de bonis non* to a *feme covert* granted to the representatives of the husband, an appearance having been given and administration prayed by the next of kin of the wife. The Court directing that though the modern practice had been otherwise, such grants should for the future pass to the husband's representatives, unless cause to the contrary was shown.

221. BETTS v. MITCHELL, 10 Mod. 316.

Held, that an executor could not join promises to the testator, with a count on a promissory note to himself, *as executor*, for a debt of the testator, payable to the plaintiff or order.

Overruled in Partridge & ux v. Court, 5 Price, 412; King v. Thom, 1 T. R. 487.

222. BEVERLEY v. BROOKE, 2 Leigh, 426.

Doubted in Conrad v. Harrison & al., 4 Leigh R. 540: Carr, J.—"In that case the decisions of Ch. Kent (1 John. Ch. 447; 5 ib. 235. 241, 2.) now cited, so powerful in their reasoning seemed to have escaped both the bar and the bench."

223. BEVERLEY'S CASE, 4 Co. Rep. 123.

Res. 1. That every deed, feoffment, or grant, which any man *non compos mentis* makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law that no man of full age shall be in any plea to be pleaded by him, received by the law to stultify himself, &c.

Denied in Harrison v. Lemon, 2 Blackf. 51: Held, that drunkenness is not of itself sufficient to avoid the deed, unless it is shown to amount to an absolute privation of understanding at the time, similar to cases of idiocy or insanity. See also Mitchell v. Kingman, 5 Pick. 431; Barrett v. Buxton, 2 Aik. 167; Prentice v. Achorn, 2 Paige Ch. R. 30; Samuel v. Marshall, 3 Leigh, 567. See also Ball v. Mannin, 3 Bligh's R. 1.

224. BEXWELL v. CHRISTIE, Cowp. R. 395.

Private bidding, by or on behalf of the vendor, is a fraud.

Doubted. 1 Sug. Vend. p. 24 *et seq.* Wheeler v. Collier, 1 M. & M. 123. Mr. Sugden remarks (p. 29);—"The strong leaning of the courts, however, is at present against the validity of a sale where even a single puffer is employed, although after the decisions to the contrary upon this point, which are daily acted upon, it would be difficult to come to such a conclusion, except in the House of Lords."

225. BEYNON v. GOLLINS, 2 Bro. Ch. Ca. 323; 2 Dick. 697.

This case has been supposed to warrant the position that feme covert executrix shall not be answerable to creditors at law, after the coverture, for waste done by the husband during coverture.

But the contrary is ruled in Adair v. Shaw, 1 Sch. & Lefr. 243. 259, by Ld. Redesdale, who says "the note in Brown is clearly erroneous in many points; and the note in Mr. Dickens' book is directly contrary and equally erroneous, according to my recollection of the case."

226. BICKERDIKE v. BOLLMAN, 1 Term, 405.

Considered in Lafitte v. Slatter, 6 Bing. 623, as an excepted case and not to be extended.

227. BIDDEFORD v. ONSLOW, 3 Lev. 209.

The note of the reporter, that the Plf. (lessor,) during the term, could not have maintained trespass, is denied in Starr v. Jackson, 11 Mass. 519.

228. BIDWELL v. COTTON, Hob. 216.

Overruled in Barber v. Fox, 2 Saund. 137. Porter v. Bille, 1 Freem. 125.

229. BIGGS v. LAWRENCE, 3 Term, 454.

Held, that where A. had ordered goods of B., to be delivered to C., an acknowledgment in the hand-writing of C. of the delivery, was evidence against A.

Overruled by Ld. Kenyon, 7 Term, 688; and Mr. Starkie, Ev. p. 25 n. (k.) says, "The case is wrongly abstracted in the marginal note; the agent was not employed to *buy* goods."

230. BINDSTEAD v. COLEMAN, Bunb. 65.

Ld. Redesdale thought there was no great dependence to be had on this case, it being uncertain whether what the Chief Baron is there made to say, was said in the case before the Court, or not. 1 Sch. & Lefr. 34.

231. BINGLEY v. MALLISON, 3 Dougl. 333.

S. P. as in Anon. 2 Wils. 135.

232. BINNS v. M'CORKLE, 2 Browne's R. 90.

That uttering slanderous words either oral or written may justify by pleading that he had heard what he uttered, if the repetition was without malice.

Doubted in Williams v. Greenwate, 3 Dana, 434, 5.

233. BIRCH v. CREW, cited 5 B. & A. 332. Abbott.

S. P. as in Goodtitle d. Revett v. Braham. (Post.)

234. BIRCH v. E. OF LIVERPOOL, 9 B. & C. 392.

If a person hire a carriage at a stipulated price *per annum*; and according to custom the hirer may dissolve the contract at any time by payment of one year's hire. Held, that this was within the statute.

Oppo. Donnellan v. Read, 3 B. & Adol. 399. Held, that the 29 Car. 2. c. 3. s. 4, does not require an agreement to be in writing, one part of which is to be performed within a year, and the other not. In Smith Mer. Law (Law L. Phila. p. 176. n. (h.)) it is said, "The word agreement in the same section, has been frequently construed to mean all that is to be done on *both sides*, a meaning which Donnellan v. Read denies to it. See Wain v. Warlters, 5 East, 10; Saunders v. Wakefield, 4 B. & A. 595."

235. BIRD v. RANDALL, 3 Burr. 1853.

"I am aware that in Bird v. Randall, Ld. Mansfield is reported to

have said that a former recovery need not be pleaded, but will be a bar when given in evidence. I cannot, however, accede to that; for the very first thing I learned in the study of the law, was, that a judgment recovered must be pleaded." Per. Abbott C. J. in Vooght v. Winch, 2 Barn. & Ald. 662.

236. BIRDSALL v. PIXLEY, 3 Wend. 3. 425.

As to remedy by attachment for not producing papers to enable a party to declare as ordered by the court.

Overruled in S. C. 4 Wend. R. 196.

237. BIRI v. BARLOW, Doug. 162; Peake's L. Ev. 358.

In an action *crim. con.*, the defendant's admission is not sufficient evidence of the fact of marriage.

Doubted it seems, 2 Stark. Ev. 251. (6 Am. ed.) acc. 8 S. & R. 159; Rigg v. Curgenvan, 2 Wils. 39; 2 Phil. Ev. 210, 211. (7 Lond. ed.)

238. BIRK v. KIRKSHAW, 2 East, 458, and Ilderton v. Atkinson, 7 Term, 480.

Overruled in Townsend v. Downing, 14 East, 565; Jones v. Brooke, 4 Taunt. 464; Scott v. M'Lellan, 2 Greenl. R. 199; Hubbley v. Brown, 16 John. 70.

239. BIRKS v. TRIPPETT, 1 Saund. 33.

That a sum due by award was not a debt or duty.

Overruled. Lawes on Assumps. 190, (235.)

240. BIRLEY v. GLADSTONE, 3 M. & Selw. R. 205.

Whether the owner of the ship was entitled to detain the cargo, not for freight generally, but for dead freight, that is, for the freight of goods not laden: *held*, that he was not.

Denied in the Sch. Volunteer and Cargo, 1 Sumner, 551. 577.

241. BIRMINGHAM v. KIRWAN, 2 Scho. & Lef. 447.

Although Ld. Redesdale is made to say in Birmingham v. Kirwan, that he saw no distinction between the right to dower and other rights, the law has certainly seen and marked very clearly such a distinction. Power v. Sheil, 1 Moll. Ch. R. 312.

242. BIRT v. KERSHAW, 2 East, 458.

An indorser was admitted for defendant, to prove payment of a note.

Overruled in Edmonds v. Lowe, 8 B. & C. 407; Bagnall v. Andrews, 7 Bing. 217. See Shuttleworth v. Stephens, (post).

243. BISCOE v. KENNEDY, and Wife, 2 Wils. 127.

Doubted in Johnson v. Driver, 1 Dowl. Pr. R. 127.—Littledale.

244. BISHOP v. CHAMBRE, 1 Dans. & Lloyd R. 83; M. & M. 116; 3 C. & P. 53.

That a bill or note though inadmissible in evidence as a security by a material alteration, might nevertheless be looked at by a jury for collateral purposes, viz. in proof of a common count in a declaration.

Overruled in Jardine v. Payne, 1 B. & Ad. 671. See Sutton v. Toomer, 7 B. & C. 416; Sweeting v. Halse, 9 ib. 365; Bank of America v. Woodworth, 18 John. R. 391.

245. BISHOP of LONDON v. FYTCHE, Dom. Proc. 1783.

That a general resignation bond from the incumbent to the patron is void.

Doubted per Ld. Kenyon in Bagshaw v. Bossely, 4 D. & E. 81, 82. Vid. also Patridge v. Whiston, 4 D. & E. 359.

246. BIZE v. DICKASON, 1 S. & R. 285.

S. P. as in Grove v. Dubois, (post.)

247. BLACKBURN v. OGLE, 8 Price, 526.

The certificate of a bankrupt does not destroy the debt, and he *may be held to bail* on the demand revived by a subsequent promise.

Overruled in Peers v. Gadderer, 1 B. & C. 116.

248. BLACKENHAGEN v. BLUNDELL, 2 B. & Ald. 417.

A note payable to one *or* other of two persons, is not a good promissory note within the statute.

Doubted. See Walrad v. Petrie, 4 Wend. 576.

249. BLACKET v. WIER, 3 B. & C. 385.

Denied in 14 Wend. 603. See Ashman v. Goldney.

250. BLACKSTONE'S COMMENTARIES.

"I am always sorry to hear Mr. Justice Blackstone's Commentaries cited as an authority: he would have been sorry himself to hear the book so cited: he did not consider it such." Per Ld. Redesdale in Shannon v. Shannon, 1 Sch. & Lefr. 327.

251. BLACKSTONE'S COMMENTARIES, Lee ed. & anno.

Law Mag. for 1832, no. 17, after repeating what Ld. Kenyon said in respect to Plowden's Treatise on Usury, (see post)—"regrets that it is not the last. Mr. Thos. Lee editor and anno. of Bl. Com. has advocated irreligion, but fortunately both his dishonesty and irreligion is so obscured and nonsensical as to render his lucubrations innocuous."

252. 2 BLACK. COM. 347.

In respect to an alien's right to take real property by grant.

Denied in Governeur's heirs v. Robertson, 11 Wheat. 351 to 354.

253. 3 BLACK. COM. 145. 147.

That replevin lies only in the case of an unlawful distress.

Denied in Pangburn v. Patridge, 7 J. R. 143.

254. 3 BLACK. COM. 146.

Replevin is founded solely on a taking by distress.

Denied in Shannon v. Shannon, 1 Sch. & L. 324. "It lies upon any taking, and not merely upon a distress."

255. 3 BLACK. COM. 166.

That a future event cannot be warranted, as, that a horse shall be sound two years hence.

Overruled. See Liddard v. Kain, 2 Bing. 183; Eden v. Parkinson, Dougl. 705; and Mr. Coleridge note in 3 Black. C. 166.

256. BLACKSTONE'S (WM.) REPORTS.

"Not very accurate." Per Ld. Mansfield, Doug. 92. n.

257. BLACKWELL v. HARPER, 2 Atk. 92.

That in a suit for pirating prints, held that the date need not appear on the original print. Best, C. J. in 4 Bing. 235, says, 'better reported in 1 Barnadiston, 210, and the decision is denied and overruled.'

258. BLACKWELL v. NASH, 1 Str. 535.

Doubted in Goodisson v. Nunn, 4 T. R. 764. See Johnson v. Read, 9 Mass. 78.

259. BLAKE v. FOSTER, 2 Ball & B. 565. 575, *et seq.*

Reversed in House of Lords, (1823); Math. P. Ev. 333, note (d).

260. BLAKELY v. GRANT, 6 Mass. 386.—Parsons.

A copy of the protest of a foreign bill should be given or offered to the drawer, or due diligence used to furnish him with this notice, before he can be charged, if when the bill was drawn his connection with the drawee was such as gave him a right to draw.

Denied in Lenox v. Leverett, 10 Mass. 1; Wells v. Whitehead, 15 Wend. 530; (Chit. on B. 498. n. (y).) But see Chit. on B. 8th Am. ed. p. 498.

261. BLAKEWAY v. E. of STAFFORD, 2 Eq. Ca. Abr. 579.

Doubted per Ld. Redesdale, 1 Sch. & Lefr. 109; better reported in 2 P. Wms. 373.

262. BLANCHARD v. GOSS, 2 N. H. R. 491.

Trespass not sustained where an execution was issued by a justice of peace against the body of the debtor, in a case where by law no such execution could issue.

Oppo. Green v. Morse, 5 Greenl. R. 291. See Pierson v. Gale, 8 Verm. R. 509.

263. BLANCHARD v. MYERS, 9 Johns. 66.

The court on the authority of (Willes R. 271) held, that the execution having *begun to be executed* before the suing out of the certiorari, the certiorari was not a supersedeas, and the officer might proceed.

Overruled in the *People on the rel.* of Gould v. The Judges of the C. P. of N. Y., 1 Wend. 81; (7 Cow. 417, 490.)

264. BLAND v. ANSLEY, 2 New Rep. 331. Upton v. Curtis, 1 Bing. 210; 1 Phill. 64 (7 London ed.); 5 Mon. 164.

The sheriff takes goods of A. B. on execution against A. B.; the latter cannot be a witness for the sheriff to prove the goods his property.

Doubted by Park, J. in Martin v. Jackson, 1 C. & P. 17; Vide Lothrop v. Muzzy, 5 Greenl. 450; and Lampton v. Lampton, 6 Mon. R. 164.

265. BLAND v. HASLERIG, 2 Ventr. 151.

Overruled in Whitcomb v. Whiting, Doug. 651.

266. BLAND v. SWAFFORD, Peake N. P. C. 60.

Ld. Kenyon held, that a plaintiff could not maintain an action against a witness, unless he suffered the cause to be called and was nonsuited.

Doubted in Barrow v. Humphreys, 3 B. & Ald. 398. Overruled in Mullett v. Hunt, 1 Cr. & M. 752.

267. BLASDALE v. HEWITT, 3 Caines' R. 137.

Overruled in Bennett v. Hurd, 3 J. R. 438; Teel v. Fonda, 4 ib. 304.

268. BLATCH v. ANKER, Cowp. 66.

An examined copy of a writ returned and filed, and of the indorsement thereon, on which writ is indorsed apparently by the sheriff's authority, the name of the bailiff employed to make the levy, is evidence to prove who was the bailiff so employed by the sheriff, evidence not being added that the indorsement of the bailiff's name on the writ itself was made by the sheriff's authority.

Overruled in Hill v. Middlesex (Sheriff), 7 Taunt. 8; Holt, 217.

269. BLEECKER v. BOND, 3 Wash. C. C. R. 531; Evans v. Hettick, 3 Wash. C. C. R. 408.

Held, that the deposition of a witness living without the district and more than 100 miles from Philadelphia could not be admitted; it not having been taken upon a commission.

Overruled. Pettibone v. Derringer, 4 Wash. C. C. R. 215. 219, and in Petapsco Ins. Co. v. Southgate, 5 Pet. R. 604.

270. BLICK'S CASE, 4 C. & P. 377.

Whatever is evidence against the principal, is *prima facie* evidence of his guilt, as against the accessory, to prove the felony.

Overruled in *Turner's case*, 1 Moody, C. C. 347.

271. BLIN v. CAMPBELL, 14 Johns. 432.

If the injury be attributable to negligence, though it were immediate, the party injured has an election, either to treat the negligence of the defendant as the cause of the action, and to declare in case, or to consider the act itself as the injury, and to declare in trespass. (1 Chit. pl. 127.)

Denied in Gates v. Miles, 3 Conn. R. 64:—The case is "founded on the erroneous proposition of Chitty, which he has since corrected."

272. BLOXSOME v. WILLIAMS, 3 B. & C. 232.

Was the case of a *private* sale of a horse, and an action brought upon a warranty, and to recover back the price; upon objection that the purchase was made on a *Sunday*, Mr. J. Bayley, expressed a doubt, whether the statute applied to *private* sales, such as were not open breaches of the *Sunday*.

Overruled in Fennell v. Ridler, 5 B. & C. 406; Smith v. Sparrow, 4 Bing. 84: Held, that no action lies on a contract entered into on a Sunday.

273. BOARDMAN v. DEFOREST, 5 Conn. R. 1.

Presumption of payment from lapse of time was applied to a judgment.

Denied in Smith v. Miller, 14 Wend. 191; but the principle of the Connecticut case is adopted by statute in New York. (2 R. S. 301. s. 46.)

274. BOARDMAN v. GORE, 15 Mass. R. 336.

Denied in Boody v. Keating, 4 Greenl. R. 164.

275. BODENHAM v. PURCHAS, 2 B. & Ald. 39.

"Much narrowed by the case of Simpson v. Ingraham, 2 B. & C. 65." —Per Taunton, J. in 2 Dowl. Pr. C. 515.

276. BOEHM v. CAMPBELL, 8 Taunt. 639.

Doubted in Morley v. Boothby, 3 Bing. 113.

277. BOGGS v. BARD, Rawle, 102.

Overruled in Klive v. Guthart, 2 Pen. R. 490. 493, *et seq.*

278. BOLIN et al. v. HUFFNAGLE, 1 Rawle.

As to the right to stop goods in transitu.

Oppo. Coates v. Railton, 6 B. & C. 422. *it seems;* and by Stubbs v. Lund, 7 Mass. 453.

279. BOLTON (Duke of) v. WILLIAMS, 2 Ves. Jr. 145.

A *feme covert* separated *a mensa et thoro*, can sue and be sued without joining the husband.

Denied in Lewis v. Lee, 3 B. & C. 291. But see Dean v. Richmond, 5 Pick. 461.

280. BOND v. WARD, 7 Mass. 129.

That hay in a cock or barn is not liable to attachment.

Overruled in Campbell v. Johnson, 11 Mass. 184.

281. BONHAM'S Doct. CASE, 8 Co. 118.

When a statute is made against common right and reason, the common law will render the statute void.

Overruled. See 1 Black. Com. 41. n. But see Bowman v. Middleton, 1 Bay, 252; and Dwarf on Statutes, p. 642 *et seq.*

282. BONHAM'S CASE, 8 Rep. 121 a.

Ld. Coke here said that the cause of commitment by the censors of the College of Physicians was traversable. But this is denied by Ld. Holt, for that persons constituted with power to fine and imprison are thereby made judges of record, &c. Groenvelt v. Burwell, 1 Com. Rep. 79, 80.

283. BONNER v. The PROPRIETORS of the KENNEBEC purchase, 7 Mass. 745.

Explained in Wells v. Prince, 9 Mass. 508 and by Mellen, C. J. in 5 Greenl. 157.

284. BOODEN v. ELLIS, 4 Mass. 115.

Denied in Selden v. Beale, 3 Greenl. R. 182.—Mellen, C. J.: "The case seems to have received but little consideration; and the language is so general, that, if adopted as it stands, it would go far to abolish all the distinctions as to the different classes and forms of actions."

285. BOOTHBY v. VERNON, 9 Mod. 147.

Denied in Park on Dower, p. 65, *et seq.*

286. BOOTH, GEORGE.

'His treatise on Real Actions, from the want of a treatise of the kind, is even cited as an authoritative compilation; though, perhaps, not always satisfactory in its depth and extent of useful learning, and is still less remarkable for the clearness and elegance of its method. But the laborious diligence of the author entitles him to applause.' 3 Wood. 26.—'So little did Booth understand of principles.' 3 Black. Com. 298 note.—'A very imperfect work.' Notes to North's study of the laws, p. 76.

287. BOOTH, JAMES.

Was a conveyancer; and Buller, J. (4 Ves. 322.) said 'no man in his life of the profession possessed greater ability.'

288. BOSON v. SANFORD, 3 Lev. 258; 3 Mod. 320; 2 Salk. 440, 1; Show. 29; 2 ib. 478.

Ld. Ellenborough said, "this case had been shaken to its foundations in the main points which it assumed to determine." 3 East, 69. Vid. Abbot v. Smith, 2 Bl. R. 947; Rice v. Shute, 5 Burr. 2613; 5 T. R. 651.

289. BOSTICK v. RUTHERFORD, 4 Hawks, 83. S. P. as in Johnston v. Martin, (post).

Doubted in M'Rae v. Oneal, 2 Dev. R. 169.

290. BOSTOCK v. SAUNDERS, 3 Wils. 484; S. C. 2 Bl. R. 912; (2 H. Pl. C. 116.)

That the informer in a case of search under a warrant for stolen goods, if the goods are not there he cannot justify in trespass.

Overruled in Beatty v. Perkins, 6 Wend. 382; Cooper v. Booth, 3 Esp. R. 135.

291. BOTTOMLY v. BROOK, 1 Term, 621.

That an equitable demand can be set off at law.

Denied by Littledale, J. in 4 B. & Ad. 752.—"I think *Bottomly v. Brook*, 1 T. R. 621, was not properly decided, that under the statutes of set-off the court can only notice an interest at law."

292. BOUDINOT v. BRADFORD, 2 Dall. 268.

Denied by Yeates, J. in 1 Binn. 580:—"The opinion attributed to the court, I recollect, fell, from the C. Justice; it was a sudden answer to a point made by Mr. I.; but there was no decision of the kind by

the court." See also p. 584, and 3 Binn. 561.—Tilghman.

293. BOURS v. TUCKERMAN, 7 J. R. 528.

Overruled in Sanford v. Meech, 12 Wend. 147.

294. BOUTELLE v. COWDIN, 9 Mass. R. 254.

Explained in Pembroke v. Stetson, 5 Pick. 506. "We cannot believe it was intended by the court to lay down the proposition, that the contributors for a valuable object, being indulged with credit, instead of making immediate payment, their promise being made to a party capable of receiving it, and compellable by law to apply the proceeds of the fund according to the original intent of the contributors, is void for want of consideration." And Mellen, C. J. (6 Greenl. 446.) "We would add that we cannot believe such a proposition to be law."

295. BOWCHER v. NOIDSTROM, 1 Taunt. 568.

"Although there was a pilot on board, the pilot does not represent the ship, and that the master was still answerable for every trespass."

Doubted, See Sproul v. Hemmingway, 14 Pick. 1; Aldrich v. Simmons, 1 Stark. 210; where the master was not on board at the time of the accident, he was held not liable. Snell v. Rich, 1 John. 305. Neither, it seems, if on board. The Portsmouth, 6 Rob. R. 317.

296. BOWEN v. BELL, 19 John. 390. Lowther v. Crummie, 8 Cow. 87.

Oppo. Snell v. Loucks, 11 John. R. 69; Pickert v. Dexter, 12 Wend. 153.

297. BOWER v. TAYLOR, cited 7 Taunt. 574.

Overruled in Touissant v. Hartopp, 7 Taunt. 571.

298. BOWERS v. HURD, 10 Mass. R. 427.

Overruled in Amherst Academy v. Cowls, 6 Pick. 434—Parker, C. J.: "The intimations in regard to the conclusiveness of the admission of "value received" are not supported in their full extent by the authorities." Although the consideration is expressly admitted in a written promise, it may be denied and proved not to have existed, in a suit between the original parties.

299. BOWERS v. JEWELL, 2 N. H. R. 543.

The effect of an alteration of a note.

Doubted in Bailey v. Taylor, 11 Conn. 540. See 1 Phil. Ev. 477, n.

300. BOWES v. HOWE, 5 Taunt. 30.

In an action on a note by the payee or bearer, against the maker, if the place of payment is embodied in the note, it is a condition prece-

dent that it should be presented for payment at that place; and an omission to aver such presentment in the declaration is fatal, and judgment will for that cause be arrested.

Denied in Wolcott v. Van Santwood, 17 J. R. 253, 254; Baldwin v. Farnsworth, 1 Fairf. R. 414; Ruggles v. Patten, 8 Mass. 480.

301. BOWLES v. LANGWORTHY, 5 Term, 366.

Decided on the authority of King v. Middlezoy (post); and cannot be supported, unless upon the principle suggested in 2 Phil. Ev. p. 334 note. (7 Lond. ed.)

302. BOWRING v. STEVENS, 2 C. & P. 327.

The vendor of a lease of a public house stated that his returns had averaged £300 a month; and Abbott, C. J. said, "the question is, whether, on the whole of the evidence, the jury are satisfied that the defendant practised a fraud and deceit on the plaintiffs;" and the court refused a new trial.

Oppo. Cross v. Peters, 1 Greenl. R. 389; and see 2 K. C. 485, 6.

303. BOYD v. HEINZELMANN, 1 Ves. & Beame, 381.

Overruled by Mills v. Fry, 3 Ves. & Beame, 9; Anon. 2 Maddock Rep. 395.

304. BOYER v. BLACKWELL, 1 Stark. R. 426.

That as the purchaser had taken contiguous lots in confidence of having both, he has an option to open the biddings as to the one, if the other were taken from him.

Doubted in Casamajor v. Strade, 2 M. & K. 706; (8 Cond. R. 199.)

305. BOYFIELD v. BROWN, 2 Stra. 1065.

Overruled in Mason v. Skurray, cited in Park on Ins. p. 160.

306. BOYNTON v. WILLARD, 10 Pick. 166. New Assignment.

Doubted in Amer. Jurist, No. 1019, Jan'y. 1834.

307. BOZON v. WILLIAMS, 3 Y. & J. 475.

In a bill by assignees of a bankrupt, a plea that the suit had been instituted without the consent of the creditors, or of the commissioners as required by the statutes 3 Geo. 2. c. 30, and the 6 Geo. 4. c. 16, was allowed, chiefly on the ground of a similar plea having been allowed in the Court of Chancery in Ocklestone v. Benson, 2 Sim. & Stu. 265.

Overruled in Jones v. Yates, cited in 2 Y. & J. (*Mem. at the beginning*,) where it was said, "that, if the Master of the Rolls and the Vice Chancellor continued of the opinion then entertained by them, the rule would, for the future, be different in the Court of Chancery."

308. BRACTON :—"Neither Bracton nor Granville are to be cited as authorities, but rather as ornaments to discourse." Plowden, 357.

"Bracton seems to have been great authority with Staunforde; for it appears from the reports that he ventured to cite and argue from this father of the English law upon the bench. I was astonished to find Fitzherbert inform us, that it was agreed by the whole court in 35 Hen. VI. that Bracton was never for an author in our law. It was a pleasure to find that the Year Book had given no warrant for this opinion. The readers of Abridgments have been long aspersing the reputation of Bracton with more success than authority." 4 Reeve's Hist. 570.

309. BRADBURY v. REYNEL, Cro. Eliz.

An executor *de son tort* remains liable, though he has delivered the effects of the intestate to the administrator.

Oppo. Anon. 7 Mod. 31. Keble v. Osbaston, cited 11 Mod. 39, n.

310. BRADFORD v. THE MINISTER, ELDERS, &c. OF THE DUTCH CHURCH IN ALBANY.

Reversed in 8 Cowen, 457.

311. BRADHURST v. THE COLUMBIAN INS. CO., 9 John. R. 9.

If a ship, in a case of extremity, and to avoid impending danger, be voluntarily run ashore, and happen to be destroyed and lost by the act of running her ashore, there shall be no contribution.

Overruled in Caze v. Reilly, 3 Wash. C. C. R. 298; Gray v. Wain, 2 S. & R. 229. But see Scudder v. Bradford, 14 Pick. 13. the principle of which seems to be, that if by the voluntary sacrifice of the ship, the cargo is rescued from the peril impending, the latter shall contribute; but it must appear to have been rescued by that *means*, and not *tanquam ex incendio.*

312. BRADSHAW v. ROGERS, 20 John. R. 103.

Reversed in Rogers v. Bradshaw, 20 John. R. 735.

313. BRADLEY'S LESSEE v. BRADLEY, 4 Dall. 112.

Yeates, J. in 4 Binn. 157 says, "that case is reported erroneously."

314. BRADT v. KOON, 4 Cowen, 416.

Better reported as to the facts in The People v. N. York C. P., 13 Wend. p. 653 by Ch. J. Savage.

315. BRADWELL v. WEEKS, 1 Johns. Ch. R. 206.

Reversed in 13 Johns. 1 :—and decided that if an alien dies in this state intestate without issue during a war with his native country, leaving personal property, his relations, abroad, though next of kin, being

alien enemies resident in the country of the enemy, are not entitled to distributive shares of the property, but the whole will go to his next of kin residing in this state, against the decree of the Ch.

316. BRANDRAM v. WHARTON, 1 B. & Ald. 463.

The authority of Whitcomb v. Whiting, (2 Doug. 652) was questioned in respect to payment made by one joint party liable, is a payment for all, and enures to the benefit of all.

Doubted in Sigourney v. Drury, 14 Pick. where it was decided that payment of interest by one of the makers of a joint and several promissory note, was sufficient to take the case out of the statute of limitations, even in respect to a mere surety. See Whitcomb v. Whiting, (post.)

317. BRASON v. DEAN, 3 Mod. 39.

Overruled in Brewster v. Ketchell, 1. Salk. 198. Vid. also 2 Eq. Ca. Abr. 26. 3 Bro. P. C. 401.

318. BRECKBILL v. TURNPIKE CO., 3 Dall. 496.

That an action of *assumpsit* would not lie against a corporation.
Overruled in Chesnut Hill Turnpike Co. v. Butler, 4 S. & R. 16.

319. BREED v. EATON, 10 Mass. R. 21—1 Phil. Insu. 211.

Denied in Riggin v. Patapsco Ins. Co., 7 Har. & J. 289—Dorsey, J. as to Mr. Philips' classing this case 'as though it turned on deviation.'

320. BRENNAN v. CAMENT, Bul. N. P. 45. 3 Selw. N. P. 1163. Sayer, 224.

Much shaken by the reasoning of Ld. Eldon in Cowill v. Simpson, 16 Ves. jr. 275 and of Gibbs, C. J. 2 Marsh. Rep. 339. Hutton v. Bragg, and see Ex parte Lewis, 2 Gallis, 488.

321. BRENT'S CASE, Dyer, 340, a. 2 Leon. 14.

"Leonard's is by far the best report of the case." Sug. p. 15. (n. 6.)

322. BRETT v. BEALES, M. & M. 421.

Doubted in Woodward v. Cotton, 4 Tyrw. R. 689. 694—Ld. Lyndhurst—"The case of Brett v. Beales must have been misunderstood, or, from something equivocal which appears in its terms, is misreported."

323. BRETT v. RIGDEN, Plowd. 344.

It is said to have been determined in the 39 H. 6. 18, that if a man devise a certain estate, and have nothing in it at the time, but purchase it afterwards, it shall pass; because, it must be taken that his intent was to purchase it, and were it not to pass, the will would be void.

Denied by Lord Holt in Bunker v. Cook, 11 Mod. 278; S. C. Fitzg. 225, as being not even the *dictum* of a judge, but an assertion of counsel, and unwarranted by the book cited for it; in which he is supported by Ch. J. Trevor in Arthur v. Bokenham, 11 Mod. 163; Girard et al. v. The City of Philadelphia, 4 Rawle, 335.—Gibson.

324. BREWSTER v. CLAPPER, 1 Wils. 261; 1 Bl. Rep. 51.

Overruled in Doughty v. Lascelles, 4 D. & E. 520; vid. 7 D. & E. 447. n.

325. BRICKWOOD v. FANSHAW, Show. 96.

That stat. 3 Jac. 1. c. 7, and 2 Geo. 2. c. 23, respecting the delivery of a bill of his fees, by an attorney, do not extend to business done in the inferior courts.

Overruled in Clark v. Donovan, 5 D. & E. 694.

326. BRIDGE v. ABBOTT, 3 Bro. C. C. 224.

Doubted in Price v. Strange, 6 Madd. 159; but confirmed in Palin v. Hills, 1 M. & K. 470, (7 Cond. 132.) Ld. Chan.:—"I cannot, for the first time, overrule such an authority as that of Bridge v. Abbott, without any one case, and with scarcely one *dictum* the other way—an authority worthy of all acceptation on all accounts, for the learning, most pains taking, and most candid judge who decided it—an authority never yet noticed but to be approved, when it has been brought under the deliberate consideration of the court."

327. BRISTOW v. WRIGHT, Dougl. 665.

In an action against the sheriff for taking goods without leaving a year's rent, the declaration need not state the particulars of the demise, but if it does, and they are not proved as stated, there shall be a nonsuit.

Doubted in Gould's Pl. p. 164, note (28). But Smith's Sel. Lead. Cases, p. 328 has the following note:——

"I am aware," said Mr. Justice Buller, in Peppin v. Solomons, 5 T. R. 496, "that the case of Bristow v. Wright has been sometimes doubted, but I am still of opinion that it was rightly decided. In order to entitle the plaintiff to maintain that action, it was necessary for him to show that he was landlord, it being an action for taking the lessee's goods, without leaving a year's rent; and, to show that the plaintiff was the landlord, he was obliged to set forth a contract between himself and the tenant. Now, contracts are in their nature entire, and in pleading they must be stated accurately; but as the evidence in that case did not accord with the contract stated in the declaration, and which was the foundation of his action, it was properly determined that a judgment of nonsuit should be entered." Accord. Savage v. Smith, Blacks. 1101; Williamson v. Allison, 2 East, 452, *ubi per* Lord Ellenborough, C. J. "With respect to what averments are necessary to be proved, I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not neces-

sary to prove it; but otherwise if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, though the averment may be more particular than it need have been, the whole must be proved or the plaintiff cannot recover." This, it may be observed, is an expression of the same doctrine that was laid down by Lord Mansfield in the principal case, in the following words:—"The distinction is between that which may be rejected as surplusage and what cannot."

Upon this doctrine appears mainly to depend the real utility of the *videlicet* or *to wit*, so often introduced by pleaders before matter of description; a precaution which is totally useless where the statement placed after the *videlicet* is material; but which, in other cases, prevents the danger of a variance, by separating the description from the material averment, so that the former, if not proved, may be rejected, without mutilating the sentence which contains the latter. See Symons v. Knox, 3 T. R. 68. Thus in Lampleigh v. Braithwaite, *ante*, p. 67, it is laid down by the court, that under the averment, *that the plaintiff did his endeavor, videlicet, in equitando*, it would not have been necessary to prove *riding*, but any other endeavor would have served. Bristow v. Wright continues to be the leading case upon the subject of variance; the subsequent decisions will be found collected and ably commented upon in the notes to Goram v. Sweeting, 2 Wms. Saund. 199, and will all be found to bear out and exemplify Lord Mansfield's doctrine. But the law respecting variances has, since the decision of Bristow v. Wright, received some very beneficial alterations from the legislature. In order to understand these perfectly, it will be necessary to occupy the reader for a few moments in something like an historical disquisition. After the decision in Bristow v. Wright had pointed out in glaring colors the fatal nature of a variance, the pleaders, naturally terrified at the idea of incurring a nonsuit, in consequence of a mistake in stating facts, of which their clients had, perhaps, furnished them with no very accurate account, began to swell their declarations to an extraordinary and portentous size, by introducing counts calculated to meet every aspect which it was supposed that the evidence could, at the trial, possibly assume, in hopes that some one count, at least, would be found free from any material variance. While, on the other hand, the pleader for the defendant was equally astute in framing a variety of pleas, in order to meet every possible defence upon which the evidence might enable counsel to rely at the trial. Yet, notwithstanding all these pains, it was often found, at *nisi prius*, that the case assumed some shape which the ingenuity of the pleader had not been able to divine; and the suitor, after incurring great expense, was defeated at the moment when the merits of his case were rendered apparent by the same evidence which created the variance between it and the statements contained in his pleading. In order, in some degree, to obviate these mischiefs, st. 9 G. 4, cap. 15, after reciting "that great expense was often incurred and delay or failure of justice took place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial was had, in matters not material to the merits of the case," enacted "that it should and might be lawful for every court of record holding plea in civil actions, any judge sitting at *nisi prius*, any court of *oyer* and *terminer* and general gaol delivery in England, Wales, Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such court or judge, in any civil action, *or in any indictment or information for any misdemeanor*, when any variance shall appear between any matter in writing, or in print, produced in evidence, and the recital or setting forth thereof upon the record whereon such trial is pending, to be forthwith amended in such particular, by some officer

of the court, on payment of such costs, if any, to the other party, as such court or judge shall think reasonable: and, thereupon, the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at *nisi prius* the order for the amendment shall be indorsed on the *postea*, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

The enactments of the above statute were extended by st. 3 & 4 W. 4, cap. 42, s. 23;—but "this statute does not repeal the 9 G. 4, c. 15; a circumstance which it may be found in some cases material to remember, for the power of amendment given by that statute extends to "any civil action, or *any indictment or information for any misdemeanor*," whereas the 3 & 4 W. 4, c. 42, only includes "civil actions, informations in the nature of a *quo warranto*, and proceedings on writs of *mandamus*." An indictment for misdemeanor, could therefore, be amended at the trial in any particular falling within the 9 G. 4, cap. 15, though it certainly is not included in the purview of the 3 & 4 W. 4, c. 42. There is another difference between the two statutes, though perhaps not likely to become of any practical importance. It had been considered upon the 9 G. 4, cap. 15, (though some doubts at first existed on the subject,) that the decision of the judge at *nisi prius*, upon an application to amend, was conclusive, and that the court *in banco* had no jurisdiction to review it. Parke v. Edge, 3 Tyrwh. 364; 1 Cr. & Mee. 433. The 3 & 4 W. 4, cap. 42, gives, it has been seen, an express power to move for a new trial, on the ground that an amendment under that statute has been improperly allowed; so that, if a variance between the record and a written document were to be amended, it might perhaps even now be contended, though probably without success, that the amendment had been made under the 9 G. 4, cap. 15, and that the judge's discretion was, therefore, not subject to review. I say probably without success, because it would be answered that, although the 9 G. 4, c. 15, stands unrepealed, still that the words of 3 & 4 W. 4, cap. 42, are large enough to give a concurrent power of certifying under that statute in matters comprehended within the 9 G. 4, c. 15. If that be the true construction, it would be for the judge to elect under which statute he should be taken to have certified, and he would probably elect to certify under that which leaves his judgment open to appeal. Here it must be observed, that although the party dissatisfied with an amendment made at *nisi prius* may move for a new trial on that ground, it has been held that a party dissatisfied on account of the judge's refusal to amend cannot do so. Doe v. Errington, 1 M. & Rob. 344, n.; 3 Nev. & Mann. 646.

The judges seem disposed to give a very liberal construction to this statute, and it has been announced, that leave to amend under it will not be refused on account of the supposed hardship or impropriety of the action, Doe dem. Marriott v. Edwards, 1 M. & Rob. 321. Besides this statute, there is a provision in one of the rules of court made in pursuance of it, in Hilary Term 1834, which diminishes the danger of variance which formerly existed in one particular case. It was a well-established doctrine that where a party prescribed in pleading, and his prescriptive right was traversed, he was bound upon the trial to prove a prescription to the full extent of that which was put in issue. He might indeed prove a larger prescription, and then, as that would have included the prescription traversed, he would have succeeded; but he could never be admitted to sever the prescription traversed, so as to take a verdict for as much of it as he could prove: but if the issue were on a larger right, and the proof were of a smaller one, he must have altogether failed, upon the ground of a variance between the allegation traversed, and

the evidence adduced upon the trial in support of it. 1 Wms. Saund. 269, *in notis;* 1 Camp. 309; Rogers v. Allen, *et notas;* 9 East, 185; 4 Camp. 189. Therefore among other instances, in Pring v. Henley, B. N. P. 59, it was held that if the plaintiff in replevin for taking cattle in answer to an avowry for *damage feasant* prescribe for common for all commonable cattle, evidence of a right of common for sheep and horses only, would not maintain the issue, though, if he had a general common, and prescribed for common for any particular sort of cattle, it would be good. However, as this doctrine was found productive of great injustice, it was directed by Reg. Gen. Hil. 1834, that "where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages, and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found; and for the plaintiff in respect of such of the trespasses as shall not be so justified."

"And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.*, horses, sheep, oxen, and cows, and issue is taken thereon; if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found; and for the plaintiff in respect of the trespasses which shall not be so justified."

"And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded that the allegations as to the extent of the right are capable of being taken distributively, they shall be construed distributively."

By the different provisions above enumerated, the severity of the law relating to variances in *civil cases* has been much alleviated, and very beneficial effects have been produced. In *criminal cases*, however, the law of variance, as laid down in Bristow v. Wright, still prevails in all its pristine severity; except, indeed, that it has received the slight modification produced by Lord Tenterden's act, and which has been above stated. Thus, when the prisoner was indicted for stealing "four live tame turkeys," and it turned out that the turkeys had been killed before the prisoner brought them into the county in which he was indicted, it was held that the word *live* was descriptive, and could not be rejected as surplusage, and consequently that he was entitled to his acquittal. Edward's case, Russ. & Ry. 497. So if the name of the prosecutor be stated in the indictment wrongly, as if Shakespeare be put for Shakepear, or, M'Cann for M'Carn, the variance will be fatal. Jannet's case, Russ. & Ry. 351; Shakespeare's case, 10 East, 83. Indeed, if the name used were *idem sonans* with the true one, no variance would be held to exist; as if Segrave were put for Seagrave, Williams v. Ogle, 2 Str. 889, and Benedetto for Beneditto, has been considered no variance. Abitbol v. Beneditto, 2 Taunt. 401.

So, too, if the name of any third person be material to be stated in the indictment, it must be correctly stated, or the variance will be fatal, see Durore's case, 1 Leach, 352; Jenk's case, 2 East P. C. 514; Deely's case, 1 Moody, 303; though, if the mention of that third person could be rejected as wholly immaterial, a variance in stating it would not be fatal, Pye's case, 1 Leach, 352, n.; for then the rule laid down in Bristow v. Wright, and explained in Williamson v. Alison, would apply, *viz.*, that when the whole of an averment may be struck out, without destroying the plaintiff's right of action, it is unnecessary to prove it; which rule is as much applicable to an indictment as to an action; and was expressed as follows by Lord Ellenbo-

rough, in Hunt's case, 2 Campb. 585, *viz.*: "It is a distinction that runs through the whole of the criminal law, that it is enough to prove so much of an indictment as shows the prisoner to have committed a substantive crime therein specified." And therefore it is the common practice to indict a man for stealing several articles, when in fact he has only stolen one, on proof of which the allegation respecting the others is rejected as surplusage, and he is convicted of the larceny which he has really committed. So it frequently happens that a man is indicted for committing a crime with certain aggravations, as for committing burglary, and larceny, or larceny in a dwelling-house some person therein being put in fear. In such a case, if the allegations in the indictment respecting the matter of aggravation be not proved; as if, in the former case, the theft turn out to have been committed by day, or, in the latter case, not in a dwelling-house; they may be rejected as surplusage, as the defendant may still be found guilty of simple larceny; see Withal's case, 1 Leach, 88; Etherington's case, 2 Leach, 671. This doctrine is exemplified by the recent case of R. v. Jones, 2 B. & Ad. 611. The act 9 G. 4, cap. 41, provides that no person (not a parish patient) shall be taken into any house for the reception of lunatics without a certificate of two medical practitioners. Sect. 30 enacts that any person who shall *knowingly, and with intention to deceive*, sign any such certificate, shall be guilty of a misdemeanor; and likewise that any physician, surgeon, &c., who *shall sign* any such certificate, *without having visited and personally examined the patient*, shall be guilty of a misdemeanor. The indictment stated that the defendant, a surgeon, *knowingly, and with intention to deceive*, signed a certificate required by the act, *without having visited and personally examined the patient*, contrary to the statute. The jury negatived any intention to deceive, and found the defendant guilty, subject to the opinion of the court on a case containing in substance what is above stated. The court held that the conviction was right. "Two species of misdemeanor," said Mr. Justice Taunton, "are constituted by the twentieth section of the act. To the offence first described, knowledge and an intention to deceive are essential; but the second clause makes it a substantive offence to certify without having visited, independently of knowledge or intention. The objection to this indictment on the latter clause is, not that the offence is charged with less fulness than was requisite, but with more. But if the averment which has been added to the statutory description of the offence be unnecessary, there is no reason that it should not be rejected. A man may be convicted of manslaughter on an indictment for murder, and of larceny on an indictment for burglary: and where an assault is alleged with certain intents, the party may be found guilty of assaulting, with only one of the intents alleged. These are stronger cases than the present, especially the first two, where the words rejected imply a great aggravation of crime, and call for a much higher punishment."

But this rule, *viz.*, "that it is sufficient to prove a substantive offence contained in the indictment," must be received with one qualification, *viz.*, that the offence proved must be of the *same degree* as the offence charged in the indictment; for felony and misdemeanor are offences of so distinct a nature, and so different in their consequences, that they cannot be charged in the same indictment; nor can a man accused of one be convicted of the other. Therefore, if a man be indicted for a misdemeanor, and his offence turn out to be a felony, he must be acquitted, and a new bill preferred against him for the graver offence. So where the prisoner was indicted for larceny of a parchment, which turned out to concern the realty, it was contended that he might receive judgment for the trespass of which he had been guilty in taking it. But the court held otherwise, and directed him to be discharged. Westbeer's case, 1 Leach, 14; 2 Str. 1133. To this, there is, however, one ex-

ception, created by st. 7 and 8 G. 4, cap. 29, s. 53, which enacts that if a defendant, indicted for obtaining property under false pretences, appear at the trial to have obtained it in such a manner as amounts to larceny, he shall not be acquitted by reason thereof. But the converse case is not provided for; and therefore, if it turned out that a prisoner indicted for larceny had obtained the property by false pretences, he would be entitled to his acquittal."

328. BRITTAM, or BRITTANE v. CHARNOCK, 2 Mod. 286. 1 Freem. 248.

Overruled. See Ram on Assets, 69, (47, Am. ed.)

329. BRITTON v. TURNER, 6 N. H. R. 493.

That the performance of the whole labor is a condition precedent, and the right to recover any thing dependent upon it—that the contract being entire, there can be no apportionment—and that there being an express contract, no other can be implied, even upon the subsequent performance of service, is not properly applicable to a contract, where a *beneficial service has been actually performed*:—the common understanding in the community being that the hired laborer shall be entitled to compensation for the labor he performs, though he do not continue the entire term; and the contract must be supposed to have been made with reference to such understanding, unless there be an express stipulation to the contrary.

Oppo. Stark v. Parker, 2 Pick. 267; Faxon v. Mansfield, 2 Mass. 147; M'Millen v. Vanderlip, 12 J. R. 165; Jennings v. Camp, 13 ib. 94; Reab v. Moor, 19 ib. 337. Lantry v. Parks, 8 Cowen, 63; Sinclair v. Bowles, 9 B. & C. 92; Mead v. Degolyer, 16 Wend. 632; Champlin v. Rowley, 13 ib. 258; Morgan v. Birnie, 9 Bing. 672; Patmore v. Colburn, 1 C. M. & Ros. 65; Huffman v. Bulmer, 2 C. & P. 510; Turner v. Robinson, 6 ib. 15; Sed vide Oxendale v. Wetherell, 9 B. & C. 386; Chapel v. Hicks, 2 C. & P. 214; Cutler v. Close, 5 ib. 337. Tindal.

330. BROADWAITE v. BLACKERBY, Comb. 465. 12 Mod. 163.

Denied per Buller, J. in Lane v. Wheat, 1 Doug. 313 n.; vid. Comerford v. Price, Doug. 312.

331. BROCK v. COPELAND, 1 Esp. R. 203.

Ld. Kenyon ruled that a man had a right to keep a dog, used to bite for the defence of his own premises: and no action would lie for an injury to the plaintiff in incautiously going into the defendant's yard after the gate was shut.

Distinguished from the case of Bird v. Holbrook, 4 Bing. R. 628, where it was held to be unlawful to set spring-guns.

332. BROCKLEBANK v. MOORE, cited 2 Stark. Ev. n. (s).

That a continuing guaranty is countermandable by parol.

Doubted. See Goss v. Lord Nugent, 5 B. & Adol. 66.

333. BRODIE v. PAUL, 1 Ves. Jun. 133.

Buller, J. said, that the same prevailed at law as in equity on the subject of part performance taking a case out of the statute.

Denied by Ld. Eldon in Cooth v. Jackson, 6 Ves. 29; acc. Kent, C. J. in Jackson v. Pierce, 2 John. R. 221; Kidder v. Hunt, 1 Pick. 328. Money expended by the plaintiff in execution of such contract may be recovered. So, the plaintiff recovered for trees cut down and carried away; the contract being executed. Teal v. Auty, 2 B. & B. 99.

334. BROGRAVE v. WINDER, 2 Ves. Jun. 634.

Overruled in Cripps v. Wolcott, 4 Mad. 11. See Home v. Pillans, 2 M. & K. 15.

335. BROMAGHAM v. CLAPP, 5 Cowen, 297.

Reversed in Clapp v. Bromagham, 9 Cowen, 531.

336. BROOKBARD v. WOODLEY, Peake's C. 20 n. (b). cited in 2 Stark. Ev. 374: 1 Phill. Ev. 490 *et seq.*

Evidence by *comparison of hands* is not admissible.

Denied in Lyon v. Lyman, 9 Conn. R. 61 *et seq.* See also notes to 1 Phill. Ev. 490 *et seq.* in notes.

337. BROOKER v. COFFIN, 5 John. R. 188.

To charge a female with being a common prostitute is not actionble.

Oppo. Miller v. Parish, 8 Pick. 364; Woodbury v. Thompson, 2 N. H. R. 194; Frisbie v. Fowler, 2 Conn. 707.

338. BROOKE AB. tit. Corporation, pl. 43, 22 Ass. pl. 67.

That an action of trespass will not lie against a corporation aggregate, because *capias* and *exigent* which are the proper precess in an action of trespass, do not lie against a corporation.

Denied in White v. City Council, 1 Hill's R. 570.

339. BROOKES v. COOKE, 1 Show. 57.

That an executor cannot have an action *de jure suo proprio* for an escape of one in execution on a judgment obtained by him as executor.

Overruled in Bonafous v. Walker, 2 D. & E. 126.

340. BROOKING v. JENNING, 1 Mod. 174, 5.

Ch. J. Vaughan is reported to have said, "When an infant executor comes of age, the power of an executor *durante minore ætate* ceaseth;

and the next executor is then liable to *all* actions: if the *former* executor wasted, the *new* one hath his remedy against him; but he is not liable to other men's suits," in which Atkins, J. is said to have concurred.

Denied in Thomas v. Riegel et al., 5 Rawle, 283:—"In Freeman 150, where the case is also reported, no mention is made of such opinion having been expressed by Ch. J. Vaughan." Sed vid. Jewett v. Jewett, 5 Mass. 275; 12 ib. 570.

341. BROOKS v. BROOKS, Poph. 126.

That in feoffments and grants, a party not named in the premises should not take by the habendum. But where a grant was to J. T. (the cestui que trust) habend. to G. B. the trustee, the words of grant to J. T. were rejected as surplusage, and G. B. took by the habendum. Spyve v. Topham, 3 East, 115. Vid. also Fisher v. Wigg, 1 P. Wms. 17.

342. BROOKS' CASE, Poph. 126.

Overruled in Fisher v. Wigg, 1 P. Wms. 17.

343. BROOKS v. ROGERS, 1 H. Bl. 640.

A. drew a bill of exchange in favor of C. who endorsed it to D. and before it became due A. became bankrupt and obtained his certificate. Payment being refused, C. paid it to D. and was permitted in this action to recover it of A. notwithstanding his bankruptcy.

Overruled by Ld. Loughborough in Ex parte Seddon, and doubted in Cowley v. Dunlop, 7 D. & E. 565. Vid. also Buckler v. Buttivant, 3 East, 71.

344. BROOK v. SMITH, 1 Salk. 280.

Condemnation in foreign attachment, after action brought by the creditor against the trustee, cannot be given in evidence by the latter, under non assumpsit.

Contradicted by Savage's case. 1 Salk. 291.

345. BROOKS v. WHITE, 1 Bos. & Pul. N. S. 330.

See Vaise v. Delival, post, acc.

346. BROOKS' ABR. tit. Prop. 37, cites 47 Edw. 3. 24.

That the only ownership of bees is *ratione soli*.

Doubted in Ross on Vendors, p. 176, 7:—"I think this passage in Brook will hardly be vouched to prove that a man cannot have a property in fish inclosed in a pond; though it will be as good an authority for that purpose, as to prove that the property of *all bees* must be *ratione soli*."

347. BROOM v. DAVIS, 7 East, 480, in note.

Assumpsit for erecting a booth. The defendant proved that the booth fell down owing to bad materials and bad workmanship, and that the plaintiff was fully apprised of both. Buller, J. ruled that this was no defence to the action, especially as a particular sum was specified and part of it paid; the remedy being by a cross action.

Overruled in Poulton v. Lattimore, 9 B. & C. 259; Allen v. Cameron, 1 Cr. & Mee. 837; Taft v. Inhab. Montague, 14 Mass. 282. See also Smith's C. M. L. 313.

348. BROUGHAM & COOPER'S REPORTS.

Their authority questioned in 15 vol. Law Mag. p. 146.

349. BROUGHTON v. BROUGHTON, 2 Ves. 12.

Ld. Kenyon as stated in Carey v. Askew, 8 Ves. 402, thought it wrong; but not to be disturbed. Sug. on Pow. p. 166. n. (1).

350. BROWN'S CASE, 1 Ventr. 243. 1 Phill. Ev. 78; and 2 Stark. Ev. 402, 403.

It is said by Ld. Hale, that had the woman lived with her husband *de facto* any considerable time, and assented to the marriage, by a free cohabitation, she should not have been admitted as a witness against her husband; although such husband had taken her away and married her contrary to her will.

Doubted in 4 Bl. Com. 209; 1 East's P. C. 454, Wakefield's case. 2 Russ. 605; 2 Stark. Ev. 402. n. (2d ed.)

351. BROWN v. ALLEN, Vern. 31.

Doubted it seems by Ld. Hardwicke in Lewin v. Lewin, 2 Ves. 415, and Gibson C. J. in 3 Pen. R. 386, says, "is reported in Vern. 31, briefly and unsatisfactorily."

352. BROWN v. BARRY, 3 Dall. R. 365.

S. P. as in Read v. Adams, (post.)

353. BROWN v. DAUKES, Cro. El. 11.

The words "thou art a pillory knave," held actionable.

Contradicted by Smith's case, Cro. El. 31.

354. BROWN v. DUNCAN, 10 B. & C. 93.

A distinction is drawn between cases in which the contract violates a law designed for the protection of the public, and those in which it violates a law merely designed for the protection of the revenue; in the former cases only is the contract void.

Doubted. See De Begnis v. Armistead, 10 Bing. 107; Laughton v.

Hughes, 1 M. & S. 596.—"What is done in contravention of the provisions of an act of parliament, cannot be made the subject of an action." See also Duvergier v. Fellows, 10 B. & C. 826; Little v. Poole, 9 B. & C. 192. And a penalty implies a prohibition. See judgment of Tindal, C. J. in De Begnis v. Armistead; *supra*.

355. BROWN v. GILLIES, 1 Chit. R. 372.

The rule for the allowance of bail was discharged, with costs to be paid by defendant, on an affidavit that the bail had perjured himself, on his justification, in swearing that an action, in which he had been bail, had been compromised.

Overruled in Eaglefield v. Stephens, 2 Dowl. Pr. R. 438.

356. BROWN v. HENCHMAN, 9 J. R. 75.

Denied in Tetoy v. Fargo, 10 J. R. 114, (acc. 3 Wend. 390.) the Court saying 'that in making the former decision they did not advert to an amendment of that section of the act for the better securing of debts, &c. made in 1810.

357. BROWN v. LONDON, 1 Ventr. 152. 1 Lev. 298; 1 Mod. 285.

That indebitatus assumpsit would not lie upon the acceptance of a bill of exchange.

Contradicted by Heylin v. Adamson, 2 Burr. 674; Bishop v. Young, 2 B. & P. 78.

358. BROWN v. POCOCK, 2 Russ. & Mylne, 210.

Reversed on appeal in S. C. 2 Myl. & K. 189.

359. BROWN v. QUILTER, Amb. R. 619.

Where the lessee has covenanted to repair (accident by fire excepted), and the house having been burned, the lessor being insured, and *having received the insurance money*, has neglected to rebuild, an injunction has been granted against an action at law by the lessor for the rent, till the house should be rebuilt.

Overruled in Hare v. Groves, 3 Anst. 687; Holtzapffell v. Baker, 18 Ves. 115. See the note in Mr. Eden's valuable ed. of Ld. Northington's decisions, vol. 11, p. 219. See also Leed v. Cheetham, 1 Sim. 146.

360. BROWN v. SCOTT et al., 1 Dall. 146.

That arbitrators in distinct suits have a right to consolidate.

Overruled in Groff v. Musser et al., 3 S. & R. 262.

361. BROWN v. TIERNEY, 1 Taunt. 517.

If a ship be warranted free of capture or seizure in port or ports, a

a capture by an enemy's ship while the vessel insured is lying in an open road outside of an harbor, is not within the warranty.

Mansfield C. J. in Lamp v. Vaughan, 4 Taunt. 487. said this case was very much shaken by the case of Dalgleish v. Brooke, 15 East, 306.

362. BROWN v. WOTTON, Cro. Jac. 73. A judgment and execution in behalf of a person concerned in the same trespass, was a bar.

Overruled in Sheldon v. Kibbe, 3 Conn. 214.

363. BROWN v. WOTTON, Cro. Jac. 73.

The action was trover for certain plates, and the defendant pleaded a judgment against J. S. and had him in execution for the damages. The plaintiff demurred; and judgment for the defendant; the court holding that the damages being uncertain, and having been reduced to certainty by the recovery in the first suit, this took away the action against the defendant in the subsequent suit.

Denounced in Livingston v. Bishop, 1 J. R. 290: (see 3 Conn. 44.) where it is clearly shown, that in separate actions for a joint trespass and separate recoveries, the plaintiff may elect de melioribus damnis, but can have but one satisfaction. The plaintiff having made one election shall not resort to another judgment; at the same time the property in the article is not changed without satisfaction. See Sheldon v. Kibbe, 3 Conn. 214.

364. BROWNING v. WRIGHT, 2 Bos. & Pul. 13.

The dictum of Ld. Eldon, who says that the words "grant, bargain, sell, enfeoff and confirm" import a covenant in law.

Admitted, as applied, but not the consequence he denied in his own application of them to a deed in fee. Per Kent, C. J. in Frost v. Raymond, 2 Caine's 195. Vid. authorities there cited; and Gratz v. Ewalt, 2 Bin. 95.

365. BROWN'S REPORTS, (Chancery).

"These cases are generally considered as too shortly taken; and that may be accounted for by the brief manner in which Ld. Thurlow pronounced his decrees, seldom giving his reasons for his decisions." Bridg. Leg. Bib. 49.

366. BROWN'S APPEAL, 1 Dall. 311.

Doubted in Sterrett's Appeal, 2 Penn. R. 421: "There is some omission of the facts of that case."

367. BRO. REPLEADER, 6.

"Debt vs. A. B. super de Bristol," &c. denied to be law. 1 Str. 312

368. BRUDNELL v. PRICE, Finch. 365. Paget v. Paget, 2 Ch. Ca. 161.

"From the reports in which they [the above cases,] are found, and the position they affirm, they are not entitled to any great attention." Per Sir W. Grant, in Richards v. Cil, 10 Ves. 500.

369. BRYAN v. HORSEMAN, 1 East, 599.

"The cases on the statute of limitations had gone an enormous length. There had never been such another case as that cited" Per Mansfield, C. J. in Markham v. St. George, 4 Term, 618.

370. BUCHANAN v. OCEAN INS. CO., 6 Cowen R., 318.

S. P. as in Juhel v. Church, (post.)

371. BUCKLAND v. TANKARD, 5 Term, 578.

Which was a suit by an indorsee against an acceptor, and the defendant called the drawer, who had also indorsed it in blank, and proposed to prove by him that the plaintiff had no interest in the bill, as the drawer had put it into his hands merely to receive payment from the acceptor. Lord Kenyon rejected him at the trial on the ground of interest: This opinion was affirmed by the court.

Overruled in Rist v. Hankham, 2 East, 481; Phill. p. 55; Stark. pt. p. 291; Ridley v. Taylor, 13 East, 175; Gregory v. Dodge, 14 Wend. 595, 6, and 13 Mass. 210. See opinion of Senator Tracey in Gregory v. Dodge, dissenting.

372. BUCCLE v. ALLEO, 2 Vern. 87.

Doubted in Rush v. Higgs, 4 Ves. 642. Ld. Eldon.—"The case in Vernon is very singular. How can there be a bill against all the creditors? Has that case ever been followed?"

373. BUCKLE v. MITCHELL, 18 Ves. 110; 1 Mad. Ch. 271.

That a voluntary conveyance, however free from actual fraud, is by 27 Eliz. fraudulent and void against a subsequent purchaser for a valuable consideration, though the purchaser had notice of the prior voluntary conveyance.

Denied in Cathcart v. Robinson, 5 Pet. 266—Marshall. Way v. Lyon, 2 Black. R. 76; see Villers v. Beaumont, 1 Vern. 100, where the grantor, at an ale-house, voluntarily, on a little scrap of paper under his hand and seal, settled an estate upon his cousins: Held, that the Court will not loose the fetters he has voluntarily put upon himself; he must lie down under his own folly. The case of Aundell v. Phillpot, 2 Vern. 69; Clavering v. Clavering, ib. 473; Burgett v. Burgett, 1 Ohio R. 478; Bunn v. Winthrop, 1 J. Ch. 329; Souverby v. Arden, ib. 240; Randall v. Phillips, 3 Mason, 378—all tend to show, that the legal title

is suffered to remain where it is found; and in cases where persons claim under title purely voluntary, if there is no fraud, the one having the eldest title has the estate at law, and will hold against subsequent grantees, both at law and in equity.

374. BUGELER v. ANGEL, 4 Lev. 164; 1 Ld. Raym. 494.

Doubted. Mr. Lewes (Tr. on Assump. p. 58):—"There are several different reports of the case cited; and it seems to be uncertain what the ultimate determination of the Court was." See his observations. See also 3 Mass. R. 199; 4 ib. 691, and Candler v. Rossiter, 10 Wend. 457.

375. BUCKWORTH v. THIRKELL, 4 Dougl. 232.

Doubted in Co. Litt. 247. a. note (4); Doe v. Burton, 3 B. & P. 653—Ld. Alvanley: Sug. on Powers, 35; Am. ed. (21). Sed see Moody v. King, 2 Bing. 447 and cases cited: Best, C. J. said; "Whatever conveyancers might have thought of the case when it was first decided, they have since (45 years) considered it as having settled the law, and it would be productive of much confusion to unsettle it again."

376. BUCKWALTER v. THE U. STATES, 11 S. & R. 196.

Duncan, J.—"Statutes of amendment do not extend to penal actions."

Doubted in Spicer v. Rees, 5 Rawle's R. 123.

377. BUDDLE v. WILSON, 6 T. R. 369.

In an action of the case on the custom of the realm against a carrier, defendant may plead in abatement non-joinder of partners.

Overruled in Ansell v. Waterhouse, 2 Chit. R. 1. Govett v. Radnidge, 3 East, 70.

378. BUFFIN v. BRIGGINS, Cro. Eliz. 695.

That a previous demand of arrears of a rent charge was necessary to the maintainance of an action of debt to recover it.

Denied in Boyer v. Ake, 3 Pen. R. 464 by Kennedy, J.

379. BULL v. PALMER, 2 Lev. 165.

Overruled in Heathcot v. Roberts, 5 East, 150. Bollard v. Spencer, 7 T. R. 358. Vid. 1 Ld. Raym. 437. And denied in Kline v. Guthart, 1 Pen. R. 493, 4—Gibson, C. J.:—"There is, indeed, a series of recent English decisions on this subject, arranged in 1 Saund. on Plead. & Ev. 496, which like many others, lessens, if it does not extinguish, our regret at the act which prohibits the reading of British precedents, subsequent to the date of our independence, as authority in our courts It may be safely affirmed that the recent decisions of the English

Judges have done more to unsettle the law in the U. States, than have all the American decisions together. The archtype of the series alluded to, is the apocryphal case of Bull v. Palmer, just mentioned, the principle of which has been extended in Cowell v. Watts, 6 East, 405, to an action for the price of goods sold by the executor; yet if a bond had been taken for the price, it would have been recovered according to Hosier v. Arundel, 3 B. & P. 7, and two cases still later, only, by the obligee in his own right; and thus is the mere evidence of the debt and not the nature of it, made the criterion of the right! In fact, the difference in this respect, between a bond and a note, is expressly recognised in Partridge v. Court, 5 Price, 512. It requires but another step to authorise an executor to enter into trade with the assets and contract responsibilities in a representative character. Into such inconsistencies do they fall, who forsake the beaten paths of the common law."

380. BULL. N. P. 5.

It is sufficient to prove the substance of the words.

Overruled. Rex v. Berry, 4 T. R. 218.—2 Phil. Ev. 238 n. (4.)

381. BULL. N. P. 26.

That in an action for criminal conversation, damages are properly increased or diminished, by the rank or quality of the plaintiff.

Denied in Norton v. Warner, 9 Conn. R. 174.—Peters, J.; who says—"This *dictum* has been echoed from Buller to Blackstone, from Blackstone to Espinasse, and from Espinasse to Swift. It may be doubted even in Eng. and a *fortiori* in this country, where it is considered a self evident truth, that all are created free and equal."

382. BULL. N. P. 45.

S. P. Brenan v. Currient, Say, 224.—'No person can in any case retain, where there is a *specific agreement*, between them, the other party is personally liable.'

Denied in Raitt v. Mitchell, 4 Camp. 150 note. Hatten v. Bragg, 2 Marsh. R. 839.

383. BULL. N. P. 180.

If a debt, barred by the statute of limitations, be pleaded, the plaintiff may reply the statute. If it be given in evidence on notice, it may be objected to at the trial.

Denied. 2 Wend. 294. See 16 Ib. 461.

384. BULL. N. P. 225; Roll. Abr. 683, pl. 13.

If an action or information be brought upon a penal statute, and there is another statute which exempts or discharges the defendant from

the penalty, this latter act cannot be given in evidence under the general issue, but ought to be pleaded.

Denied in Dwarf on Statutes, p. 632; 2 Phil. Ev. 165.

385. BULL. N. P. 255; Gilb. Ev. 104.

That in an ancient deed, if there be any blemish in the deed, by razure or interlineation, the deed ought to be proved, though it were above 30 years old, by the witnesses, or at least one of them; and also the hand of the party, in order to encounter the presumption arising from the blemishes in the deed.

Denied in Bailey v. Taylor, 11 Conn. R. 531.

386. BULL. N. P. 284.

"A trustee shall not be a witness to betray the trust."

Denied in Gres. Eq. Ev. p. 292 note (c).

387. BULL. N. P. 295.

That evidence of the character of an attesting witness [illegible] deceased, is not admissible.

Overruled in Provis v. Reed, 5 Bing. 435.

388. BULLER & CRIPS, cited 1 Com. Dig. 191.

Overruled in Grant v. Vaughan, 3 Burr. 1516.

389. BULPIT v. CLARKE, 1 N. R. 56.

Overruled in Short v. Hubbard, 2 Bing. 349; 9 Moore, 605; 10 Moore, 107.

390. 1 BULSTR. 177.

That "*from the date*" includes the day; but that "*from the day of the date*" excludes it.

Overruled in Pugh v. D. of Leeds, Cowp. 714.

391. BUNBURY'S REPORTS.

"Mr. Bunbury never meant that those cases should be published: they are very loose notes." Per Ld. Mansfield, 5 Burr. 2658.

392. BUNN v. RIKER, 4 John. R. 426.

S. P. as in Juhel v. Church, (post.)

393. BURD v. SMITH, 4 Dall. 76.

Denied. Gibson C. J. says, (in Jenks v. Parry, 5 Rawle, 225):—"Indeed the reasons of the Judges are so indistinctly set forth in that case, the discrepance of their views is so remarkable, as to render it of little value as a precedent."

394. BURDOCH v. GREEN, 10 I. R. 74.

That the issuing of the writ was the commencement of the suit in all cases where the time is material; as to save the statute of limitations.

Explained in Rose v. Luther, 4 Cowen, 161; the mere filing up the process is not the commencement: it must appear that it was made and sent to the sheriff or his deputy by mail of otherwise, with a *bona fide* and absolute intention of having it served.

395. BURGES v. LAMB, 16 Ves. jun. 174.

Report is erroneous. "The court has not gone farther than protecting what is planted or growing for ornament," &c.: whereas the words of Ld. Eldon were, trees—"planted and growing or standing" for ornament. Magennis v. Fallon, 2 Moll. 588.

396. BURGES v. PLAYER, 1 Freem. 497.

Overruled in Gatliffe v. Dunn, Barnes, 56. Vid. Kyd on Awards, 263.

397. BURKE, or BOURKE v. BOURKE, 2 Dowl. Pr. R. 290.

Overruled in Call v. Thelwell, 3 Dowl. Pr. R. 443.

398. BURNETT v. LYNCH, 5 B. & C. 589.

The testimony of the subscribing witness to a lease was dispensed with. It was an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of the counterpart of the lease, the defendant put in the original, which was produced by a party to whom he had assigned it: held, that it was not necessary for the plaintiff to call the subscribing witness to prove the execution of a lease.—Abbott, C. J. saying:—"It was proved at the trial that the plaintiff's testator had executed a lease, and that the plaintiffs, his executors, had assigned that lease to the defendant, and that the latter had executed a deed by which that lease was again assigned to one Dalziel, which deed so executed by Lynch recited the lease which had been granted to the testator of the plaintiffs. That recital was, as against Lynch, abundant evidence of the existence of the original lease."

Explained by Bayley, B. in Wright v. Tatham, 2 Ad. & El. 3:—"The language of the Ch. Justice in Burnett v. Lynch, shows that case was an exception from the general rule."

399. BURROW'S REPORTS.

Ld. Eldon in 19 Ves. jr. 19—"Speaking with all due deference, but with due anxiety for the information of those whom these books are written to instruct, I cannot help saying, this is not the only instance, how extremely difficult it is to rely upon the circumstances stated as the reasons of the judgment." Burrow's Reports were not published till nine years after the decisions with which they commence were given;

and these contain but a small part of the cases decided by jury and in bank; the whole number being about 600 annually; or about 25000 for the 39 years during which Ld. Mansfield was Chief Justice.

490. BURTON v. HINDE, 5 T. R. 174.

Held, that a free man could not prove the title of a corporation to a rent, which was reserved to the use of the whole corporation.

Oppo. Rex v. Mayor of London, 2 Lev. 230; Show. 146; Rex v. Netherthong, 1 M. & Sel. 337; Ellis v. Bellamy, 1 J. B. 266; Bloodgood v. Jansen, 12 ib. 266; Jackson v. Com. of Hillsborough, 1 Dev. & B. 187.

491. BURTON v. ROBINSON, 1 T. Raym. 124; 1 Sid. 246. S. C.

Overruled in Herbert v. Waters, 1 Salk. 208. Vid. also Chaney's case, 10 Rep. 140. b.

492. BUSH v. BATES, 5 Burr. 2260.

Judgment of nonsuit and for costs, and debt brought on this judgment, and special bail insisted on, as not being within 12 G. 1. c. 29. but refused.

Overruled in Lewis v. Pottle, 4 D. & E. 570.

493. BUSH v. BRADLEY, 1 Day's ca. 304.

It is said—"Seisin is necessary in their (English) law, and nothing but ownership in ours."

Denied in Chalker v. Chalker, 1 Conn. R. 83. S.—Trumbull, J. delivering the judgment of the court.—"It is a mistake to suppose from this, that our courts have arbitrarily dissevered the rules of the common law on this subject."

494. BUSH v. ROYAL EXCHANGE ASSU. CO., 2 B. & Ald. 72. (5 B. & A. 171.)

That the underwriters are liable for a loss by any of the perils insured against, the remote cause of which is the negligence of the master.

Oppo. Grim v. Phœnix Ins. Co. 13 J. R. 451; 9 Wend. 265; 9 ib. 466.

495. BUSH v. STEINMAN, 1 Bos. & Pul. 404.

The owner of a house had employed a surveyor to do some work upon it; there were several sub-contracts, and one of the workmen of the person last employed put some lime on the road, in consequence of which the carriage of the plaintiff was overturned; and it was held, that the owner of the house was liable, though the person who occasioned the injury was not his own immediate servant.

Doubted in Laugher v. Pointer, 5 B. & C. 547; by Abbott, C. J. and

L[illegible], [illegible]. [illegible] But suppose Bush v. Steinman to be rightly decided, there is this distinction, *there* the injury was done upon or near and in respect of the property of defendant, who was in possession; and the rule of law may be, that in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and, that whether his property be managed by his own immediate servants, or by contractors or their servants. But Lord C. J. Eyre at N. P. thought this action not maintainable, and says, "that he finds great difficulty in stating with accuracy the grounds on which it is to be supported. The relation of master and servant is not sufficient; and the general proposition that a person shall be answerable for any injury which arises in carrying into execution, that which he has employed another to do, seems to be too large." This case is mainly grounded upon that of Littledale v. Ld. Lonsdale, (2 H. Bl. 299.) but in that case defendant had a foreman or steward paid by him, he engaged all the under-workmen, who were paid out of the funds of defendant. All the machinery and utensils belonged to defendant, and all employed were his immediate servants. [illegible] Bayley, [illegible].

The cause of action against a master in such case arises from his employing a careless, or unskilful servant, [illegible]. It would seem, therefore, that in a case like the above, defendant is not answerable; *causa proxima, non remota, spectatur.*

406. BUSHELL v. PASMORE, 6 Mod. 218.

[illegible] without any discontinuance, [illegible], delivery [illegible], seisure, &c. the [illegible].

Doubted in 5 Bac. Abr. 373, as to the case [illegible]. But see Union Bank of Maryland v. Ridgely, 1 Har. & G. 417, *et seq.*

407. BUSSARD v. CAPEL, 4 Bing. 137.

[illegible], 3 B. & Cr. [illegible], 3 Y. & J. 344. In Exch.

408. [illegible] v. [illegible]FIELD, Cro. Jac. 577, 8.

Held, that an arbitrator had no authority, without a special provision, in the submission for that purpose, to award costs.

Overruled in Alling[illegible] [illegible]. See [illegible], [illegible]; Wood v. O'Kelly, 9 East, 436; M'Laughlin v. [illegible], 1 Binn. 41; Strong v. Ferguson, 14 J. R. 161.

409. BUTLER & BAKER'S CASE, 3 Rep. 30; Co. Litt. 299; Winchester's case, 3 Rep. 5; Back v. Andrews, Prec. in Chan. 1, S. C.; 2 Vern. 120; 2 Eq. Ca. Abr. 230. Adopted Jackson v. Stevens, 16 Johns. R. 110.

Husband and wife cannot take by moieties, during the coverture; and

he has no power to sever the jointure, nor to dispose of any part of the land; for the reason that the husband and wife are one.

Denied in Whittlesey v. Fuller, 11 Conn. R. 337—Williams. The husband and wife take as joint tenants, and consequently the husband alone can convey his interest:—In Connecticut, "deeds or devises of land to husband and wife, have been considered as vesting the estate conveyed in the same manner as to other persons."

410. BUTLER v. DAMON, 15 Mass. 223.

The court say that the indorser of a negotiable note shall not be received to show facts antecedent to the transfer, whereby the holder is to be defeated of his recovery.

Limited in Churchill v. Suter, 4 Mass. 156—'not be received as a witness to prove it originally void.' But it has been held, that in an action by the indorsee against the maker, the indorser is competent to prove facts which existed before the transfer, not proving the note void. Adams v. Carver, 6 Greenl. 390. S. P. 17 John. 176.

411. BUTLER v. HASKELL, 4 Desaus. R. 652.

Doubted in M'Cants and wife v. Bee et al. 1 M'Cord, 390. Curia, Nott, J.—"Although I believe the decision of that particular case did not give general satisfaction, yet I am of opinion that upon an impartial examination it will not be found so reprehensible as has been generally supposed."

412. BUTLER v. MALISSY, 1 Str. 76.

That in case on a joint and several note, declaration that the Deft. & *al. conjunctim vel divisim* promised, is bad.

Overruled in Rees v. Abbot, Cowp. 832.

413. BUTLER v. PLAY, 1 Mod. 27.

It was thought, that it would be sufficient to charge the drawer, if notice of the dishonor of a bill were given to him even at the end of two months, if he had sustained no damage by the delay.

Overruled in Leftley v. Mills, 4 T. R. 174; Anon. Ld. Raym. 743; Coleman v. Sayer, 2 Stra. 829; Muilman v. D'Eguino, 2 H. Bl. 365; Williams v. Smith, 2 B. & A. 496.

414. BUTLER v. SWINERTON, (Lady,) Cro. Jac. 657.

Better Reported in Palm. 339 and 2 Roll. R. 286. See Woodhouse v. Jenkins, 9 Bing. 431.

415. BUTLER v. WARREN, 11 John. R. 57.

The Court considered the admission of an interested witness to prove the service of a notice on the defendant to produce a paper in his pos-

session on the trial, preparatory to giving evidence of the contents of the paper, as an infraction of the rule of law, which precludes the admission of an interested witness to give evidence.

Overruled in Jackson v. Frier, 16 John. 193.

416. BUTTS v. PENNY, 2 Lev. R. 201.

'That trover lies for *Negroes*, being usually bought and sold among merchants, as merchandise, and also being infidels, there might be a property in them sufficient to maintain trover.'

Denied in Forbes v. Cochran, 2 B. & C. 448. Best, J. said—"I am aware of the case in Levinz, but this question was never decided, and if it had, in the case of Smith v. Gould, 2 Ld. Raym. 1274; 2 Salk. 666, the whole court declared the opinion there not law."

417. BUTTS v. SWARTWOOD, 2 Cowen, 432 note and supp. note, p. 572.

Held at N. P. that persons who deny any future punishments might testify.

Denied in Atwood v. Welton, 7 Conn. 75—Daggett, J. who says it is opposed to Jackson v. Tuttle, 18 John. R. 98.

418. BUXTON v. BEDAL, 3 East, 303.

Overruled in 3 M. & Selw. 178; 6 Taunt. 11; 5 B. & Ald. 613; 2 C. & P. 159; See Pinner v. Arnold, 2 C. M. & R. 613; 1 Tyr. & G. 1.

419. CAINES v. MARLEY, 2 Yerg. R. 582.

If a gift is in writing, delivery of possession is not essential.

Oppo. Cotteen v. Missing, 1 Madd. Ch. R. 176; Morris v. Owen, 2 Call R. 432; S. P. as in Caines v. Marley, (ante).

420. CALDWELL v. CASSIDY, 8 Cow. 272, 3.

The Ch. J. said that in case of a note payable on demand at a certain place, (a bank note for instance), a demand would be necessary to sustain an action.

Denied in Haxtun v. Bishop, 3 Wen. R. 20, 21, by the same Ch. J., who says, 'a holder of a bank note previous to suit need not make a demand of a note payable *on demand at the bank;* but if the bank is solvent, a defence will be made out, which will subject the plaintiff to costs. So, too, upon a bank note payable generally on demand, the commencement of a suit is a demand.'

421. CALLAGHAN v. AYLETT, 2 Campb. 549.

If a bill of exchange be accepted payable at a certain place, in an ac-

tion against the acceptor the plaintiff must prove a demand at the place where it became due.

Overruled. Fenton v. Goundry, 13 East, 459; vid. Lyon v. Sundius, 1 Campb. 423; Wild v. Rennards, ib. 425; Nichols v. Bowes, 2 Campb. 498.

422. CALLIS, 103.

Overruled in The Inhabitants of Outwell, Style, 192, as to the point, that the commissioners of sewers, may make new banks, walls, fences, &c.

423. CALVERLY v. PHELP, 6 Mad. 229.

The principle of making the *cest. q. trust* parties was carried in Calverly v. Phelp, further than it had been before: much further than other judges had carried it. The soundness of that decision was not universally assented to. Bifield v. Taylor, 1 Moll. Ch. R. 196.

424. CALVERT v. ROBERTS, 3 Camp. 343.

Held, that the alteration of even an accommodation bill after acceptance, and whilst in the hands of the drawer invalidated it.

Overruled in Downes v. Richardson, 1 D. & R. 332. 5 B. & Ald. 674. S. C. Johnson v. Gibbs, 2 Chit. R. 123; Sherrington v. Jermyn, 3 C. & P. 374.

425. CALYE'S CASE, 8 Coke, 32.

Liability of Innkeepers.

Explained in Smith's Sel. Lead. Cas. p. 50, thus :—"This is the leading case upon the subject of the liabilities of innkeepers in respect of their guests' property: in a subsequent case, goods belonging to a factor were lost, out of a private room in the inn, chosen by the factor for the purpose of exhibiting them to his customers for sale, the use of which was granted to him by the innkeeper, who, at the same time, told him that there was a key, and that he might lock the door, which the guest however neglected to do, although on two occasions, while he was occupied in showing part of the goods to a customer, a stranger had put his head into the room. The judge, Richards, C. B., told the jury, that *prima facie* the innkeeper was answerable for the goods of his guest in his inn, but that the guest might, by his own conduct, discharge him from responsibility, and left it to them to say whether he had done so here: the jury found that he had: and, on a motion for a new trial, the court approved of the direction of the learned judge, and thought the verdict was correct. "The law," said Lord Ellenborough, "obliges the innkeeper to keep the goods of persons coming to his inn, *causa hospitandi*, safely, so that, in the language of the writ, *pro defectu hospitatoris hospitibus damnum non eveniat ullo modo*. . . . But there may no doubt be circumstances, as where the guest, by his own misconduct induces the loss, which form an exception to the general liability, as not coming within the words, *pro defectu hospitatoris*. Now, let us consider, 1st, whether the plaintiff came to the inn *causa hospitandi*; and 2dly, whether by his conduct he did not induce the loss. It does not appear whether he had a sleeping room, but I think we may presume he had, but he desires a private room up some steps in order to show his goods.

Now an innkeeper is not bound by law to find show rooms for his guests, but only convenient lodging-rooms and lodging. As to what is laid down in Calye's Case, respecting the delivery of the key to the guest, it plainly relates only to the chamber door in which he is lodged ; and I agree that if an innkeeper gives the key of the chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper . . . The cases," continued his lordship, " show that the rule is not so inveterate against the innkeeper, but that the guest may exonerate him by his fault, as if the goods were carried away by the guest's servant, or the companion whom he brings with him, for so it is laid down in Calye's Case. Now, what is the conduct of the plaintiff in this place? The innkeeper not being bound to find him more than lodging, and a convenient room for refreshment, this does not satisfy his object, but he inquires for a third room, for the purpose of exposing in it his wares to view, and introducing a number of persons, over whom the innkeeper can have no check or control, and thus for a purpose wholly alien from the ordinary purpose of an inn, which is *ad hospitandos homines*. Therefore, the care of these goods hardly falls within the limits of the defendant's duty as innkeeper. Besides, after the circumstances relating to the strangers took place, which might well have awakened the plaintiff's suspicion, it became his duty, *in whatever room he might be*, to use, at least, ordinary diligence : and particularly so, as he was occupying the chamber for a special purpose : *for though, in general, a traveller who resorts to an inn may rest on the protection which the law casts around him, yet, if circumstances of suspicion arise, he must exercise ordinary care.* It seems to me that the room was not merely entrusted to the plaintiff in the ordinary character of a guest frequenting an inn, but that he must be understood as having taken a special charge of it, and that he was bound to exercise ordinary care in the safe keeping of his goods, and it is owing to his neglect, and not to the fault of the innkeeper, that the accident happened : and this was a question proper to leave to the jury." Burgess v. Clements, 4 M. & S. 306, accord. Farnworth v. Packwood, 1 Stark. 249. But in another case, where a traveller went to an inn with several packages, one of which was, by his desire, taken into the commercial room, into which he was shown, and the others into his bed-room, which, according to the usual practice of that inn, was the place to which goods were taken, unless orders were given to the contrary, and the package taken into the commercial room was stolen, the innkeeper was held responsible, and Holroyd, J., distinguished the case from Burgess v. Clements, by saying, that there the plaintiff asked to have a room which he used for the purpose of trade, *not merely as a guest in the inn*. Richmond v. Smith, 8 B. & C. 9. So in Kent v. Shuckard, 2 B. & Ad. 803, the plaintiff and his wife, with Miss S., arrived at the defendant's inn, and took a sitting-room and two bed-rooms so situated that the door of the sitting-room being open, a person could see the entrances into both bed-rooms. On the following day, the plaintiff's wife went into the bed-room, and laid on the bed a reticule, which contained money, and returned into the sitting-room, leaving the door between that and the bed-room open. About five minutes afterwards she sent Miss S. for the reticule, which was not to be found. The innkeeper was held responsible for it, and it was held that there was no distinction between money and goods as to the liability of innkeepers. So when the plaintiff drove his gig to the defendant's inn on Bewdley fair-day, and asked whether there was room for the horse, the ostler of the defendant took the horse out of the gig and put him into a stable, and the plaintiff carried his coat and whip from the gig into the house, and took some refreshment there, the ostler placing the gig outside of the inn-yard, in a part of the open street in which the defendant was in the habit of placing the carriages of his guests

on fair-days. The gig was stolen thence: and the court held the innkeeper responsible, for it did not appear that the defendant put the gig in the street at the request or instance of the plaintiff: the place was, therefore, a part of the inn, for the defendant by his conduct treated it as such. If he wished to protect himself, he should have told the plaintiff that he had no room in his yard, and that he would put the gig in the street, but could not be answerable for it. Jones v. Tyler, Ad. & Ell. 522.

It is not necessary in order that a man may be *a guest*, so as to fix the innkeeper with this sort of liability, that he should have come for more than a temporary refreshment, Bennett v. Mellor, 5 T. R. 273; and in York v. Grindstone, 1 Sal. 388, 2 Lord Raym. 860, three judges held, against Lord Holt's opinion, that if a traveller leave his horse at an inn, and lodge elsewhere, he is, for the purpose of this rule, to be deemed a guest; "because," said they, "it must be fed, by which the innkeeper hath gain; otherwise if he had left a dead thing." But it is clear that if the innkeeper receive goods as a bailee, and not in the character of an innkeeper, they do not fall within it. Hyde v. Mersey and Trent Navigation Company, 5 T. R. 389; Jelly v. Clarke, Cro. Jac. 188: Bac. Abr. Inns, C. 5. The length of time for which the guest has resided, seems not to affect his right as such, provided he live there in the transitory condition of a guest. But if he came on a special contract to board and lodge there, the law does not consider him a guest, but a boarder. Bac. Abr. Inns, C. 5; Parkhurst v. Foster, Sal. 388.

The definition of an inn is "*a house where the traveller is furnished with every thing he has occasion for while on his way.*" Thompson v. Lacy, 3 B. & A. 283. See Bac. Abr. Inns, B.; but a mere coffee-house is not an inn, at least not within the meaning of a fire policy. Doe v. Laming, 4 Camp. 77."

426. CAMBRIDGE v. ANDERTON, 1 Car. & P. R. 215. 2 B. & C. 697, S. C. in note.

Bayley, J.—"I take the legal principle to be, that if by any perils within the policy, the ship ceases to retain the character of a ship, the party may sell her, and recover as for a total loss, without any abandonment."

Overruled in Roux v. Salvador, 1 Bing. N. C. 526. See Gordon v. Mass. F. & M. Ins. Co. (post.)

427. CAMDEN v. MORTON, cited 18 Ves. 118; 2 Eden, 219.

Questioned and overruled in Hare v. Groves, 3 Anstr. 687, and Holtzapffel v. Baker, 18 Ves. 115.

428. CAMPBELL v. ARNOLD, 1 Johns. 511.

That lessor cannot maintain trespass *quare clausum fregit* for an injury done to the land while in possession of tenant at will, &c.

But the contrary is settled in Massachusetts in Starr v. Jackson, 11 Mass. 524.

429. CAMPBELL v. LEACH, Ambl. 749.

Ld. Redesdale doubted that part of this case which attributes to Ld. Ch. J. De Grey the opinion that the remainder-man could not enforce

the contract of the tenant for life, with power to lease, &c. Vid. 1. Sch. & Lefr. 65.

430. CAMPBELL v. SANDYS, 1 Sch. & Lef. 281.

Denied by Mr. Sugden (on Pow. p. 245. n. (1)) as to Ld. Redesdale doubting the doctrine of Ld. Hardwicke, &c. that executors and administrators may take as special occupants.

431. CAMPBELL'S REPORTS.

Mansfield, C. J. in 5 Taunt. 195, 6, said—" whoever looks through Campbell's Reports, will be greatly surprised to see among such an immense number of questions, many of them of the most important kind, which came before that noble and learned judge (Ld. Ellenborough), not that there are mistakes, but that he is in by far the most of the causes so wonderfully right beyond the proportion of any other Judges."

432. CANAL COMMISSIONERS, &c. v. TIBBITS, 6 Cowen, 518 note.

Reversed in 5 Wend. 423.

433. CANNING v. DAVIS, 4 Burr. 2417.

Burrow in his index states—" Variance—between declaration and process: 1st, An executor suing out process as executor may declare in his own right;" &c.

Denied in Meggs v. Ford, 4 Dougl. 266, and n. (c).

434. CANTY v. SUMTER, 2 Bay, 93.

Held, on the authority of Walton v. Shelly, that the obligee in a bond, who had assigned it, could not be admitted, in an action thereon by the assignee, to prove payment.

Overruled in Croft v. Arthur, 3 Desaus. R. 223; and now confined to negotiable paper. 3 M'Cord, 71. n.

435. CAPEL v. BUTLER, 2 Sim. & Stu. 457.

Denied in Miller v. Gibson, 1 Moll. 502.

436. CARR v. BROWN, 7 Bing. 508.

Overruled in Combe v. Woolfe, 8 Bing. 156; *giving time discharges surety or guarantee.*

437. CARR v. HOOD, 1 Camp. R. 355.

Best, C. J. in Thompson v. Shackell, 1 Mo. & M. 188, said that he did not go quite as far as Ld. Ellenborough; because he thought that no personal ridicule of the author was justifiable.

438. CARR v. KING, 12 Mod. 372.

Held, that mere proof of prior cohabitation was *prima facie* sufficient evidence to charge the husband.

Overruled in Hindley v. Westmeath, 6 B. & C. 200.

439. CARROL v. NORWOOD, 5 Har. & J. 163.

Denied in Pennington v. Bordley, 4 Har. & J. 466.—Johnson, J. dissenting, who said:—"And to take away from the judgment in the case of Carrol v. Norwood, its binding authority, it may be remarked that it was bottomed on the case of Thompson v. Brown, (1 Har. & J. 335.) which had been decided by the general court in 1803, and that too at a time when that case had five years before been reversed by this court. The case then of Carrol v. Norwood, was made to rest on a decision which had been overruled when Carrol and Norwood was determined."

440. CART v. REES, 1 P. Williams, 381.

S. P. as in Betts v. Kempton, (ante.)

441. CARTER v. DE BRUNE, Dick. 39.

Service of a subpœna out of Chancery on a person who transacted business for defendant under a general power, held good.

Denied in Smith v. Hibernian Mine Co. 1 Sch. & Lefr. 238, 240.

442. CARTER v. MURRAY, 5 John. Ch. 522; Jones v. Pengree, 6 Ves. 580; Duff v. East Ind. Co. 15 Ves. 198; Barber v. Barber, 18 Ves. 179. 185.

That open accounts, though they be between merchant and merchant, are barred, where the last item is beyond the time of limitation.

Oppo. Mandeville v. Wilson, 5 Cranch, 15; Watson v. Lyle, Same v. Robinson, 4 Leigh, R. 249.

443. CARTHEW'S REPORTS.

Carthew was 'a reporter of no great merit.' (1 Woods. 495.) 'He had a very imperfect way of reporting.' 3 ib. 99.

Lord Thurlow in the case of the Bishop of London v. Fytche (1783) said 'Carthew & Comberbach were equally bad authority.' Clarke's Bib. Leg. 355; yet Lord Kenyon, 2 T. R. 776, 'in general, is a good reporter;' and Willes, C. J. (Willes, 182), 'Carthew is, in general, a very good and a very faithful reporter.'

444. CARTWRIGHT v. BLACKWORTH, 1 Dowl. P. C. 489.

That an award, that a verdict for a sum certain should be entered for the plaintiff, is tantamount to an order that the defendant shall pay so much to the plaintiff.

Overruled in Donlan v. Brett, 2 Ad. & El. 344. See also, Jackson v. Clark, M'Clel. & Y. 200; S. C. 13 Price, 208.

445. CARTWRIGHT v. GREEN, 8 Ves. 435; 2 Leach, 952.—Lord Eldon.

"If a pocket book is left in a hackney coach, and the coachman did not know to whom it belonged, he acquired it by finding certainly, but not being entrusted with it for the purpose of opening it, this is felony according to the modern cases."

Oppo. People v. Anderson, 14 John. 294; Porter v. State, Martin & Yerger, 226.

446. CARUTHERS v. CARUTHERS, 4 Bro. C. C. 500.

The language of Lord Alvanley in Caruthers v. Caruthers, gives color to the doctrine that the intended wife not under disability may by anterior agreement, in equity contract herself absolutely out of dower. If that be so, it is a new equity. Power v. Sheil, 1 Moll. Ch. R. 312.

447. CASBERD v. WARD, 6 Price, 411.

Doubted in Giles v. Grover, 1 Clark & Fin. 101, 2.—Alderson: "And it is said by Mr. Baron Wood, 8 Price, 318, that the *liberate* and the *fi. fa.* are equivalent to each other; but I think that proceeds on a mis-statement of the true point in the case."

448. CASE v. DAVIDSON, 5 M. & S. 79; 2 Bro. & B. 379. S. C.; 8 Price, 559.

That the underwriter on the ship, after an abandonment, is entitled to the whole freight of the voyage then in the course of being earned, as incident to the ownership of the ship, without distinction between the portion of the freight, whether earned as a *pro rata* freight antecedent to the abandonment, or that earned afterward.

Oppo. Hammond v. Essex Fire Ins. Co. 4 Mason, 196, 201 and cases cited.

449. CASE OF THE DEAN AND CHAPTER OF FERNES, Davies' R. 121.

That a corporation could not do any thing without deed.

Overruled in The Bank of Columbia v. Patterson, 7 Cranch, 299; Fleckner v. U. S. Bank, 8 Wh. 338; 9 ib. 738.

450. CASE OF THE GRATITUDINE, 3 Rob. Adm. R. 274.

It was doubted whether the master could in any case, bind the owners beyond the value of the ship and freight.

Oppo. to such doubt, Cary v. White, 1 Bro. P. C. 284; James v. Bixby, 11 Mass. 34; Milward v. Hallett, 2 Caines' R. 77.

451. "CASES TEMP. NOTTINGHAM."

Said per Ld. Hardwicke that the book of "Reports of cases in Equity in Ld. Nottingham's time" was of no authority. 1 Wils. 162. Vid. 3 Atk. 334.

452. CATHCART v. LEWIS, 1 Ves. jr. 463.

The case of an assigned judgment.—Story, J. in 4 Mason, 42:—"Here also, there are no circumstances stated in the report, enabling us to ascertain the nature of the assignment."

453. CAVE v. CAVE, 2 Vern. 508.

Ld. Hardwicke said he had ordered the Register to be searched, and that as the case is there stated it is impossible there could be that question in the cause which the book states, 1 Atk. 556

454. CAVERLY v. DUDLEY, 3 Atk. 541.

This case is treated very lightly by Ld. Eldon in Jones v. Harris, 9 Ves. 494, who says of it, "as to Caverly v. Dudley, if I am to decide on such grounds, I may decide just what I please."

455. CAWDREY AND TETLEY'S CASE, Godb. 441, citing Palmer's case (Palmer v. Boyer,) Cro. Eliz. 342; Comyn's Dig. Action on the case for defamation, D. 13, to D. 27, and F. 8, to F. 10.

Limited in Ayre v. Cravan, 2 Ad. & Ell. 2; and holding that in actions of slander for words spoken of a physician, the declaration ought not merely to state that such scandalous conduct (words imputing adultery to the plaintiff) was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession.

456. CAWLIN v. LAWLEY, 2 Price, 12.

Denied in Kemp v. Sumner, 2 Y. & J. 405.—Hullock, B.

457. CECIL v. SALISBURY, 2 Vern. 224.

It is not law. There are few reporters so inaccurate as Vernon. Russell v. Russell, 1 Moll. Ch. R. 526.

458. CHADWICK v. THE PROPRIETORS of HAVERHILL BRIDGE, 2 Dane's Abr. 686.

Doubted in Day et al. v. Stetson, 8 Greenl. R. 368.—Weston.

459. CHAMBERLAIN v. GORHAM, 20 John. 144.

Reversed in S. C. 20 John. R. 746: Held, that a notice, with the plea, of the matters to be given in evidence, is sufficient, if it contain a statement so as to prevent the plaintiff from being taken by surprise.

460. CHAMBERS v. FUREY, 1 Yeates' R. 167; Saville, 11 pl. 29.

Held, that the owner of a ferry has no right to land his boats on the public road.

Oppo. PETER v. KENDALL, 6 B. & C. 703.

461. CHAMBERS v. GRIFFITHS, 1 Esp. 150.

Overruled in Roots v. Dormer, 4 B. & Ad. 77; James v. Shore, 1 Stark. 426. See also 2 M. & Keene, 706.

462. CHAMBERS v. JONES, 11 East, 408. S. P. as in Griffith v. Eyles, (post).

Overruled in The Middle Dist. Bank v. Deyo, 6 Cowen, 735. *et seq.*

463. CHAMBERS LAND. AND TENANT, p. 591.

"If the lessor enter *without ousting* the tenant, although he damages the premises *irreparably*, it will not be a sufficient entry to suspend the rent."

Doubted. See Bennet v. Bittle, 4 Rawle, 344.

464. CHAMBERS v. ROBINSON, 1 Str. 691.

Denied in (2 Wils. 249) by Lord Camden who said, 'that there seemed to be but one case before his time where a new trial was granted in actions for *torts*, and that was the case of Chambers v. Robinson, (1 Str. 691.) where the jury gave £1000 damages in an action for a malicious prosecution.' The court, he added, were free to say, *that* case was not law. See also Coleman v. Southwick, 9 John. 45. Graham on New Trials, p. 444.

465. CHAMPNEYS v. PECK, 1 Stark. R. 404.

The plaintiff in order to prove the delivery of his bill as an attorney, proved the death of D., who had been his clerk, and produced the bill, with an indorsement on it in the handwriting of the clerk; and having proved the existence of the indorsement at his death, &c. the evidence was admitted.

Doubted. Stark. Ev. p. 313 n. (h); "The ruling of Ld. Ellenborough in this case has been questioned more than once, but I am not aware that it has been expressly overruled."

466. CHANCELLOR v. POOLE, Dougl. 764.

Doubted in Steward v. Wolveridge, 9 Bing. 60—Gaselee and Bosanquet, Js.

467. 2 CH. CASES.

"Most of these cases grossly misreported"—Said per Ld. Loughborough, 1 H. Bl. 332.

However, Ch. Kent (1 K. C. 458.) says—"the report of some cases in the 3d and last vol. of the reports in chancery, and the great case of the Duke of Norfolk, and the case of Bath and Montague, at the conclusion of the cases in chancery, are distinguished exceptions to this complaint."

468. 2 CHAN. CAS. 244.—Pow. on Mort. 1043—2 Swift's (Conn.) Dig. 197.

That on a bill of foreclosure, the title cannot be investigated.

Denied in Palmer v. Mead, 7 Conn. R. 160, by Daggett, J.

469. CHANCEY v. NEEDHAM, 2 Strange, 1081.

Denied by Ld. Kenyon, in 7 T. R. 20. 'But if correctly reported there, it does not warrant the proposition which Archbold, (2 Arch. 14) has extracted from it, that in no one case will the court allow judgment to be entered upon a warrant of attorney after the death of the defendant, and which Mr. Graham, in his Practice, p. 620, has adopted. (Pr. Savage, Ch. J. in Nichols v. Chapman, 9 Wen. 454.)

470. CHANDELOR v. LOPUS, Cro. Jac. 4 cited, 2 Croke, 2, and Esp. N. P. 629.

The case of a bezoar stone, sold by one skilled, to one unskilled in precious stones, ubi revera, it was of inferior value:—and held that no action would lie, without a scienter laid and proved, or an express warranty, &c.

Denied in Bradford v. Manly, 13 Mass. 143.

In Smith's Sel. Lead. Cases, p. 78 are the following observations:—

"If the plaintiff in this case were to declare upon a warranty of the stone, he would at the present day perhaps succeed, the rule of law being that *every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended.* See Shepherd v. Kain, 5 B. & A. 240; Freeman v. Baker, 2 Nev. & Mann. 446. If not, he would at all events succeed, if he were to sue in *tort*, laying a *scienter*, since the fact of the defendant's being a jeweller would be almost irresistible evidence that he knew his representation to be false. When Chandelor v. Lopus was decided, as the action of *assumpsit* was by no means so distinguishable from *case*, ordinarily so called, as at present: so the distinction was not then clearly recognized, which is now, however, perfectly established, between an action upon a warranty express or implied, which is founded on the defendant's promise that the thing shall be as warranted, and in order to maintain which it is unnecessary that he should be at all aware of the fallacious nature of his undertaking; and the action upon the case for false representation, in order to maintain which, the defendant must be shown to have been actually and fraudulently cognisant of the falsehood of his representation; actions of the former description being then usually framed in *tort* under the name of *actions for deceit.* See Williamson v. Allison, 2 East, 446; the observations of Grose, J. in Pasley v. Freeman, 3 T. R. 54, and of Tindal, C. J., in Budd v. Fairmaner, 8 Bingh. 53. Steuart v. Wilkins, Dougl. 18, is said by Lawrence, J., in 2 East, 451, to have been the *first* case where the question was regularly discussed, and the mode of declaring in *assumpsit* established,

However, the main doctrine laid down in Chandelor v. Lopus has never since been disputed, *viz.* that the plaintiff must either declare upon a contract, or, if he declare in *tort* for a misrepresentation, must aver a *scienter*. That such an action is maintainable when the *scienter* can be proved, though there be no warranty, is now (notwithstanding the *dictum* in the text) well established. Dunlop v. Waugh, Peake, 223; Jendwine v. Slade, 2 Esp. 572: Dobell v. Stevens, 3 B. & C. 625; Fletcher v. Bowsher, 2 Star. 561.

It is sometimes not very easy to determine whether an action of *assumpsit* upon a warranty should be brought against the vendor of a chattel, or whether the proper remedy be by action upon the case for misrepresentation. We have already observed, that every affirmation respecting the chattel, made, at the time of sale, by its vendor is a warranty, *if so intended*. But it is sometimes far from easy to decide, whether a particular assertion was, or was not, intended for a warranty; and, if it turn out to have been meant, merely for a representation, the plaintiff suing on it must aver a *scienter* in his declaration, and must not treat it as a warranty, but will be defeated unless it turn out to have been false within the knowledge of the party making it. Such was the case of Budd v. Fairmaner, 8 Bingh. 52, where the plaintiff, in order to prove the warranty, put in the following instrument, signed by the defendant:—"Received of Mr. Budd 10*l.* for a grey four year old colt, warranted sound in every respect."

It was held at *Nisi Prius*, and afterwards by the court in banc, that the warranty applied only to the soundness, and that the age was mere matter of description, and the plaintiff, who had sued as upon a warranty of the age, was nonsuited.

With respect to actions upon the case for a false representation, although the declaration always imputes to the defendant fraud, and an intent to deceive the plaintiff; and although it is expressly laid down that "fraud and falsehood must concur to sustain this action," per Gibbs, C. J., Ashlin v. White, Holt, 387; still in order to prove such fraud as the law considers sufficient to sustain the action, it is only necessary to show that what the defendant asserted was false within his own knowledge, and occasioned damage to the plaintiff. Foster v. Charles, 6 Bingh. 396, 7 Bing. 108; Corbett v. Brown, 8 Bing. 433. In Polhill v. Walter, 3 B. & Adol. 122, the defendant, who had formerly been in partnership with Hancorne, and still carried on business in the same house, accepted, as *per procuration* of Hancorne, a bill drawn on the latter. The bill was afterwards indorsed to the plaintiff, who gave value for it, and having been dishonored by Hancorne, the plaintiff sued the defendant for "falsely and *fraudulently* pretending" to accept the same by procuration of Hancorne. At the trial, the jury being directed by Lord Tenterden to find for the defendant if they thought there was no fraud, otherwise for the plaintiff, found a verdict for the defendant; his Lordship giving the plaintiff leave to move to enter a verdict; which motion was accordingly made, and the rule to enter the verdict for the plaintiff ultimately made absolute.

"If," said Lord Tenterden, delivering the judgment of the court, "the defendant, when he wrote the acceptance, and thereby in substance represented that he had authority from the drawer to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did,) the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence."

471. CHANDLER v. PARKES & DANKS, 3 Esp. R. 76; Jaffray v. Frebain, Wilson, & Black, 5 Esp. 47.—Kenyon and Ellenborough.

In a joint action on a joint contract, and one defendant pleads infancy, the plaintiff cannot enter a *nolle prosequi* against the infant and proceed against the others :—he was bound to begin *de novo*.

Overruled in Hartness & al. v. Thompson & al., 5 John. R. 160; Woodward v. Newhall et al., 1 Pick. 500. (Noke v. Ingham, 1 Wils. 89.) But see Burgess v. Merrill, 4 Taunt. 468.

472. CHANEL v. ROBOTHAM, Yelv. 68.

If in trover, a bond is called goods, it is a fatal defect.

Overruled. Dyer, 5. b. n. Cook v. Bossinger, 4 Mood. 156. Anon. 1 P. Wms. 267.

473. CHAPMAN'S CASE, cited 1 Stra. 129.

Lord Parker rejected the testimony of a witness who merely considered himself bound in honor to pay a sum of money according to the event, or to contribute to the expenses of the suit.

Overruled. 1 Phil. Ev. 50; Parker v. Whitby, 1 T. R. 372; Poderson v. Stoffles, 1 Camp. 144. But Parsons, C. J. (in Plumb v. Whiting, 4 Mass. 511.) observes ;—"If a witness would testify under the impression of an interest, which he honestly believes he has in the event of the suit, he cannot be sworn."

474. CHARNLEY v. WISTANLEY, 5 East, 270, 271. 1 Chitty on Pleading, 243. 445.

A mere prayer of judgment, without pointing out the appropriate remedy, is sufficient; and, the facts being shewn, the Court *ex-officio*, is bound to pronounce the proper judgment.

The reverse of this rule is the principle of the law of Canada; where the conclusions are held to be essential to the proceedings, and must contain, *a peine de nullitie*, all that the judgment of the Court must comprehend. Forbes v. Atkinson, 1 Pyke 40.

475. CHARLESTON v. FINNEY, 1 Sid. 215.

S. P. as in Cowper v. Towers, (infra.)

Chatfield v. Paxton, 2 East, 471.

Doubted in Bilbie v. Lumbie, 2 East, 471. n. Ellenborough.

476. CHATFIELD v. SOUTER, 3 Bing. 167; 10 Moore, 572.

The court will not stay proceedings in a writ of right, until the costs of a prior ejectment are paid.

Oppo. Bowyear v. Bowyear, 2 Dowl. P. C. 207.

477. CHEDWICK v. HUGHES, Carth. 465.

Holt, C. J. says, it was the opinion of all the Judges in England, up-

on debate between them, that in civil cases, the court cannot allow a juror to be withdrawn, without the consent of all the parties.

Denied in The People v. Judges of New York, 8 Cow. 130. "The authority of that dictum is rendered rather questionable, by what appears in Foster, 36."

478. CHEETHAM v. TILLOTSON, 2 Johns. R. 63.

Reversed on a writ of error in 5 ib. 430; and deciding that after an interlocutory judgment by default, and damages assessed on a writ of inquiry, on which judgment was rendered in S. C.; and the declaration containing two distinct counts, the second of which being bad, for want of sufficient averments, and entire damages given on the whole declaration, the judgment below was erroneous;—and in S. C. 4 ib. 500, held that all amendments may be made in this court; but after joinder in error, neither party can allege diminution, or pray a *certiorari*.

479. CHEYNE v. KOOPS, 4 Esp. 112.

Ld. Alvanley seems to have been of opinion that mutual releases executed would not make the partner offered as a witness competent.

Overruled in Wilson v. Hirst, 4 B. & Ad. 760.

480. CHIDLEY v. LEE, Prec. in Chan. 228.

"I must own I think that was an extreme hard case, and I believe I should have been inclined to determine it otherwise." Per Ld. Hardwicke in Wood v. Bryant, 2 Atk. 521.

481. CHILD v. BAYLIE, Cro. J. 459.

A *grant* or devise of a *term* made to one for life, remainder to another, is good.

Denied in N. Carolina, Morrow v. Williams, 3 Dev. R. 263.

482. CHILDS v. MONINS et al. 2 Bro. & B. 460.

Held, that a promissory note, by which the makers, as executors, jointly and severally promise to pay on demand, renders them personally liable.

Oppo. Schoonmaker v. Roosa, 17 John. R. 301. Ten Eyck v. Vanderpool, 8 ib. 120.

483. CHIPMAN'S ESSAY ON CONTRACTS, 7. 96.

In a plea of tender of specific articles on the day and at the place, &c. the defendant must aver in his plea that he is *still ready*, (*tout temsprist.*)

Denied in Lamb v. Lathrop, 13 Wend. 97.

484. CHIRAC ET AL. v. REINICKER, 11 Wheat. R. 280.

Explained in S. C. 2 Pet. R. 622. *et seq.*

485. CHITTY ON CONTRACTS, 228—*Void by Statute.*

'A statute is like a tyrant; where he comes he makes all void.'

Denied in No. 20 A. Jurist (Oct. 1833) p. 242. See Norton v. Simmes, (post.)

486. 1 CHIT. CR. LAW, 223.

"Where the time for the prosecution is limited as under 7 W. 3, ch. 3, which provides that no prosecutions shall be had for certain treasons therein mentioned, unless the bill of indictment be found within three years after the crime is committed, the time, as averred in the indictment, should appear to be within the limit."

Denied in the People v. Santvoord, 9 Cow. 660.

487. 1 CH. CR. LAW, 393, 4.

Denied by Mr. J. Woodward, in The People v. Vermilyea, 7 Cowen, 121; "All the elementary writers with the exception of Chitty, lay down the proposition broadly, that if a juror has declared his opinion beforehand, it is a good cause of challenge."

488. 1 CHITTY PL. 90.

Tenants in common may join or sever in an action on a contract relating to their estate, though they must sever in an avowry for rent.

Denied in Sherman v. Ballow, 8 Cow. R. 309. "The case of Harrison v. Barnby, 5 T. R. 246 does not warrant such a proposition."

489. 2 CHITTY PL. 156 note.—Arch. Pl. 170.

That in debt on bond the amount of the penalty or upwards should be inserted in the conclusion of the declaration where there is a special condition; and Archb. says it is usual to do so.

Denied in Allen v. Smith, 7 Hals. 169, by Ewing, C. J. who says—'Williams in his note, 2 Saund. 187, b. directs that the declaration should conclude not as in covenant, but as in debt, where the damages are in general formal and nominal only. 1 Chit. 360. The direction of Chitty has not been the rule of practice even in England. 3 B. & P. 607; 5 Wend. 490. 548; see Gould's Pl. p. 177.

490. 2 CHIT. PL. 435.

Denied in Hughes v. Wheeler, 8 Cowen, 79, in respect to a negotiable security being pleaded specially in *discharge* of the action.

491. 1 CHIT. PL. 509.

Where a plea is an answer to but part of a declaration, the plaintiff should take judgment as by *nil dicit* for so much as is not justified; and not demur.

Denied in Sterling v. Sherwood, 20 J. R. 204; 2 Wend. 421, and 13

ib. 80. "Since the case of Sterling v. Sherwood, &c. each plea must contain in itself an answer to the whole declaration, or to one count in the declaration, whichever it professes to answer."

492. 1 CHIT. PL. 509. Saund. 28, n. 1, 2, 3.

If a plea begin only as an answer to part, and is in truth only an answer to part, the plaintiff cannot demur, but must take his judgment for the part unanswered, as by *nil dicit*.

Decided differently in Sterling v. Sherwood, 20 J. R. 204; Hecock v. Coates, 2 Wend. 419; Slocum v. Despard, 8 ib. 615; and Etheridge v. Osborn, 12 ib. 402, 3.

493. CHIT. PL. 622, 5th ed.

Lays it down as a general rule that in replevin the general form of a plea in bar, *de injuria*, &c. is inadmissible.

Denied in Selby v. Bardons, 3 B. & Ad. 2; see Bell v. Wardell, (ante).

494. CHUDLEIGH'S CASE, 1 Co. 121.

A leading case on contingent uses.

Reported better in 1 Anderson, 309.

495. CHUDLEIGH'S CASE, 1 Rep. 120.

The doctrine of *scintilla juris*.

Doubted by Sugden (on Pow. p. 22, 23. No. 7.): Ld. Ch. J. Anderson's report (1 And. 309) of this is indisputably the best'—'our surprise cannot fail to be excited at its ever having been considered as a decisive authority for the doctrine in question.' 'At most were mere *dicta* not in anywise necessary to the decision of the court.' Sug. on Pow. p. 31, 34.

496. CHUMAR v. WOOD, 1 Hals. R. 155.

Doubted. See Sterling v. Van Cleve, 7 Hals. 285.

497. CHURCH v. LEAVENWORTH, 4 Day R. 274.

Swift, C. J. said, 'that verdicts were never conclusive, unless they are pleaded specially, by way of estoppel.'

Denied in Kilheffer v. Herr, 17 S. & R. 324.—Rogers:

"The cases on which he relies do not support the position in the broad manner laid down," &c.

498. CHURCHILL v. SUTER, 4 Mass. R. 156.

The principle or rule of evidence settled here was, that no man shall, by his testimony, show that a contract which he himself has made and sanctioned by his name, and held out to the world as a valid one, is ille-

gal, or has any secret taint, which will render it invalid in the hands of a third person. The promissor and first indorser were called to show that the note in its formation was usurious.

Oppo. Stafford v. Rice, 5 Cowen, 23. Bank of Utica v. Hillard, ib. 153. Tuthill v. Davis, 20 John. 285.

499. CHURCHMAN v. TUNSTALL, Hard. R. 162.

Overruled in Attorney General v. Richard, 2 Anst. R. 603; and Ld. Abinger in Huzzy v. Field, 13 Law. J. 239; S. C., 2 Cromp. Meeson & Rosc. 432, goes farther, and informs us, that after the bill in that case was dismissed (which was a bill by a farmer of a ferry, as it should seem, under the crown, for an injunction to restrain the defendant, who had lands on both sides of the Thames, three-quarters of a mile off, and who was in the habit of ferrying passengers across, from continuing to do so;) another bill was brought after the restoration, in 1663, and a decree made by Lord Hale in favor of the plaintiff, that the new ferry should be put down. Per Story J. in Charles River Bridge, 11 Pet. 625. But see observations of Ch. J. Taney in S. C. p. 562, 3.

500. CLAPP v. JOSLYN, 1 Mass. 129.

Denied in 4 Greenl. R. 145.—Mellen.

501. CLARE v. CLARE, Forrester R. 21.

Shaken in subsequent cases. Lyon v. Mitchell, 1 Maddock Ch. R. 467. 486.

502. CLARK v. BRADSHAW, 3 Esp. 155.

Ld. Kenyon held that these words "the plaintiff had paid the money for him 12 or 13 years before, but that he, the defendant, had since become a bankrupt, by which he was discharged, as well by *law* as equity, from the length of time," took the case out of the statute.

Denied in Perley v. Little, 3 Greenl. R. 101; Danforth v. Culver, 11 J. R. 147.

503. CLARKE v. PARKER, 19 Ves. 1.

Doubted it seems, in Holton v. Lloyd, 1 Moll. 33.

504. CLARK v. PINNEY, 7 Cowen, 606.

When the action is brought without delay the rule of damages for breach of contract in not delivering articles is the highest price at any time between the period for the delivery and the day of trial.

Denied in Kennedy v. Whitwell, 4 Pick. 466, and Parks v. Boston, 15 ib. 206, 207.

505. CLARK v. RUSSEL, cited 6 S. & R. 358; S. P. as Read v. Adams, (post).

506. CLARKE v. TUCKER, 2 Vent. R. 183.

A corporation cannot impose a penalty for a breach of a bye-law, to *be levied* by distress.

Denied in Company of Vintners v. Clerke, 5 Mod. 157.

507. CLARKE'S CASE, O. B.; 1 Moody C. C. 376.

No person can be convicted of stealing goods when they came into his possession by the delivery of the prosecutor's wife.

Overruled in Tolfree's case, 1 Moody C. C. 243. People v. Schuyler, 6 Cowen, 572.

508. CLARKSON v. HANWAY, 2 P. Wms. 203; 2 Hovenden on Frauds, 103. 1 Ves. 128.

That a deed cannot be supported by evidence of consideration different from those alleged in it.

Denied in Jack v. Dougherty, 3 Watts' R. 151; Duval v. Bibb, 4 H. & M. 113; Eppes v. Randolph, 2 Call's R. 103; Harvey v. Alexander, 1 Rand. 219; Bullard v. Briggs, 7 Pick. 533. See 1 Maryland R. 208.

509. CLAY v. SMITH, 3 Pet. R. 411.

Doubted in Agnew v. Lamb, 15 Pick. 422. Shaw, C. J.—"The case is very briefly reported, the facts are not fully stated, and no reasons are assigned. It does not appear whether the bankrupt law of Louisiana was deemed void, as repugnant to the constitution of the United States, which was the precise ground of decision in Kimberly v. Ely, 6 Pick. 440."

510. CLAYTON v. ANDREWS, 4 Burr. 2101.

That executory contracts for sale of goods are not within the statute of frauds, sec. 17.

Overruled in Rondeau v. Wyatt, 2 H. Bl. 63. Vid. also Chater v. Beckett, 7 D. & E. 201; Cook v. Tombs, Anstr. 420; Cooper v. Elton, 7 D. & E. 14.

511. CLAYTON v. ANDREWS, 4 Burr. 2101.

A contract to deliver wheat, which was then unthrashed; Held, that the statute of frauds did not apply.

Overruled in Garbutt v. Watson, 1 D. & Ry. 219, 5 B. & A. 613.

512. CLAYTON'S CASE, 5 Rep. 1; Bacon v. Waller, 1 Ro. 337; 2 Rol. Abr. 520. pl. 4.

"From the day of the date," held, to be exclusive, and to render the demise a lease *in futuro*, and consequently void.

Overruled in Pugh v. Duke of Leeds, Cowp. 714. See Sug. on Pow. p. 210, 211, (Am. ed.) Lond. ed. 388. *et seq.*

513. CLEFOLD v. CARR, 1 Brownl. 127. 1st point.

Overruled in Aleway v. Roberts; 1 Sid. 188. 1 Lev. 38, S. C.

514. CLENDENNING & AL. v. CHURCH, 3 Caines, 141.

Admits the validity of wager-policies;—which the Courts in Massachusetts do not. 2 Mass. 1. See Juhel v. Church. (post.)

515. GLENNAN v. LETHWAITE, 2 Ves. Jun. 465.

Parol evidence of the testator's intention is admissible to rebut a presumption; and is not to be confined to the time of making the will; but it must be to shew the intention at that time only.

Overruled in Whitaker v. Tatham, 7 Bing. 628.

516. CLERK v. GILBERT, Hob. 331.

"Thou art a thief *and* hast stolen 20 loads of my furze"—held not actionable.

Denied in Wainright v. Whitley, Sty. 115. 3 Caines, 75 in margin.

517. CLERKE v. MARTIN, 2 Ld. Raym. 757; 1 Salk. 129.

Overruled in Grant v. Vaughan, 3 Burr. 1516.

518. CLERK v. WITHERS, 2 Ld. Raym. 1072. 6 Mod. 290. Salk. 322.

Holt, Ch. J. said, that the sheriff was bound by the value of the goods returned.

Denied in Williams v. Cheesborough, 4 Conn. 360; Denton v. Livingston, 9 John. R. 96; Sly v. Finch, Cro. Jac. 514; See also Giles v. Grover, 1 Clark & Fin. R. 76. 180—Patteson.

519. CLEVELAND v. UNION, Ins. Co. 8 Mass. R. 308. Ch. Justice not present and Sewall dissented.

The master of a neutral ship, left the ship's register on shore; held, that the underwriters were not liable for a loss by capture resulting from that negligence.

Oppo. Walker v. Maitland, 5 B. & Ald. 171. See also Grim v. Phœnix Ins. Co. (post.) Waters v. The Merchants' Louisville Ins. Co, 11 Pet. R. 213.

520. CLEVELAND v. ROGERS, 6 Wend. 438.

Limited in Stiles v. Stewart, 12 Wend. 474:—"The rule laid down by the C. J. in Cleveland v. Rogers, so far, as the judgments of the Justice's Courts of this state are concerned, must be considered as

confined to the case of an *avowry* or other pleading subsequent to the *declaration*.

521. CLEVELAND v. RODGERS, 1 Marsh. R. 193.

Doubted in Harrison v. Talbott, 2 Dana, 263. Robertson C. J.;—"is vaguely and unsatisfactorily reported, and may appear to be rather anomalous."

522. CLEVERLY v. BRACKETT, 8 Mass. R. 150.

That where a creditor received from his debtor a personal chattel in pledge as collateral security for the debt, he could not attach other property for the same debt, without first returning the pledge.

Denied in Morse v. Woods, 5 N. H. R. 300.

523. CLOWES v. DICKENSON et al., 5 J. Ch. R. 235.

Reversed in 9 Cowen, 403.

524. CLUTE v. ROBINSON, 2 John. R. 595.

Ch. J. Kent said "that a covenant *to execute and deliver a good and sufficient deed* of a piece of land, did not mean merely a conveyance, good in point of form; but an operative conveyance; one that carried with it a good and sufficient title to the lands to be conveyed.

Denied in Parker v. Parmele, 20 John. R. 130. 132, *et seq.*—Spencer, C. J.: "In the particular case, the opinion expressed was perfectly correct; but we must remember that this case was on an appeal from the Court of Chancery;—whether the same rule prevails at law is the question. Held, that "a good warrantee deed of conveyance," referred to the instrument of conveyance only, and not to the *title*.

525. COBB v. CARR, cited in Bul. N. P. 14.

Defendant's evidence of what he swore upon the trial of the indictment is evidence in the action for a malicious prosecution.

Denied 2 Stark. Ev. 496, n. (L).

526. COBDEN v. KENDRICK, 4 Term, 432.

Doubted by Tindal, C. J. in 9 Bing. 644. 660; "If it can be supported as to this point, we think it can only be on the ground of fraud in the defendant." And Mr. J. Holroyd says (6 B. & C. 679)—"if the money had been paid after proceedings had actually commenced. I should have been of opinion that, inasmuch as there was no fraud in defendant, it could be recovered back. This is the correct rule."

527. COCKE v. BAKER, Str. 34.

Mutual promises to marry are within the statute of frauds.

Overruled in Harrison v. Cage, Ld. Raym. 386; 1 Salk. 24.

528. COCKERILL v. BARBER, 16 Ves. 461.

Doubted by Mr. J. Story in Conflict of Laws p. 260, citing Scott v. Bevan, 2 B. & Adol. 78; and it seems Delegal v. Naylor, 7 Bing. 460, as at variance with the decision.

529. COCKERILL et ux. v. KYNASTON, 4 T. R. 277.

Denied by Ld. Kenyon in Bollard v. Spencer, 7 T. R. 354. (Mann v. Baker, 5 Cow. 268, *acc.*)

530. COCKING v. FRASER, Park, 114.

That if the articles mentioned in the memorandum at the foot of the policy specifically remain after the voyage, though damaged and worthless, the insurer is not liable.

Ld. Kenyon called this an *obiter dictum*, and said he could not subscribe to it. Vid. Burnett & Kensington, 7 D. & E. 210. And Ld. Alvanley said he was at liberty to consider the case of Cocking v. Fraser as less strong than it appears to be. Dyson v. Rowcroft, 3 B. & P. 474.

But the U. S. courts have adopted the principle of this case. Vid. Morceau v. U. S. Ins. Co., 1 Wheat. 219; 1 Caines, 196; 3 Caines, 108.

531. CODDINGTON v. BAY, 20 John. R. 637, and Roosa v. Brotherson, 10 Wend. 85.

The holder of a negotiable note, who receives it in payment of a precedent debt, takes it subject to all the equities existing between the original parties.

Doubted it seems in 14 Wend. 575—Tracy, senator; and in 11 Wend. 509—Beardsley, senator; and the contrary expressly ruled in Brush v. Scribner, 11 Conn. 388.

532. COE v. DUFFIELD, 7 B. Moore, 252.

Richardson, J. said, not that the guarantee itself contained a consideration, but that the declaration might have been framed on the *first* letter, viz. that which was prior to the guarantee, and contained the terms on which the guarantee was to be given, and showed a sufficient consideration.

Denied in James v. Williams, 5 B. & Ad. 1113—Patteson, J.

533. COE v. TURNER, 5 Conn. R. 91.

Would seem to consider multifariousness, or improperly confounding together distinct matters in one bill as bad on demurrer.

Denied in Fellows v. Fellows, 4 Cow. R. 682; 5 Paige's Ch. R. 77, so far as respects the principle that where a debtor conveys different portions of his property to several persons, in fraud of the rights of his creditors, a creditor who has obtained a judgment, and placed himself

in a situation to enforce his right against the debtor and his fraudulent grantees, may file a bill against the grantor and all the grantees jointly; to reach the property conveyed to each, and have the same applied to his judgment. But it is otherwise, in a case, where the complainants set up two distinct claims, or grounds of action, in which the separate interests of the different defendants are not connected with, and do not rise out of the single object of the suit.

534. COGAN v. EBDEN, 1 Burr. 383.

Denied in Little v. Larrabee, 2 Greenl. R. 40—Mellen C. J.—"We have examined the case in 1 Burr. 385, which is relied upon by the counsel for the tenant. It does not appear to have ever received any final determination, so as to assume the authority of a decided case."

535. COHEN v. GRIER, 4 M'Cord R. 509.

Decides that the arrest of the body, under a *ca. sa.*, is a discharge of the lien of the *fi. fa.* in the same case.

Qualified in Walker v. Briggs, 1 Hill's R. 128.

536. COKE:—

"Who thinks that if he be no licensed chirurgeon or physician that occasioneth this mischance, that then it is felony; for physic and slaves were before licensed physicians and chirurgeons."

Denied in Rex v. Long, 4 C. & P. 114.

537. COKE v. FOUNTAINE, 1 Vern. 413.

Doubted, in Byrne v. Frere, 2 Moll. 162, the report was said to be unsatisfactory.

538. COKE LIT. 8;

'That if there be two sons subjects, the father an alien, if one of the sons be seised of land and die, the other cannot inherit, because there was no inheritable blood between the father and the sons, and when the sons cannot be heir to the father, neither shall be heir to the other.'

Denied in Collingwood v. Pace, 1 Ventr. 413. (Acc. Jackson v. Green, 7 Wend. 335. 7.)

539. CO. LITT. 45 b.

Where it is said that "term" signifies the estate and interest that passes, and never denotes the number of years or times, &c.

Overruled in Wright v. Cartwright, 1 Burr. 282.

540. 3 CO. 80—Jenk. Cent. 254—Vin. Abr. Usury, pl. 3, 4—Bac. Abr. Usury, E.—1 Hawk. P. C. c. 82. s. 50.

That a fine levied, and even a judgment recovered, in pursuance of

an usurious contract, may be avoided by an averment of the corrupt agreement.

Denied in Flint v. Sheldon, 13 Mass. R. 451, 2—Jackson, J. who says:—"As to a fine, in examining the books before mentioned, and tracing the proposition to its source, we find but one adjudged case on the point. That is the case of Dodd v. Ellington, in 1 Roll. R. 41, reported also in Brownl. & Gouldsb. 191, under the name of Burclay v. Ellington. This case at most, would prove that a mortgage, in which a fine is levied as part of the assurance to the mortgagee, may be avoided for usury, as well as if made by any other mode of conveyance. See *Harning v. Castor*.

541. CO. LITT. 227 b. 3 Inst. 110. Carthew, 465.

That a jury, sworn and charged by the court, in case of life or member, and so in all cases of felony, cannot be discharged by the court, or any other, but they ought to give a verdict.

Overruled. Rex v. Edwards, 3 Camp. R. 207 and p. 209 note. The People v. Denton, 1 John. Ca. 275—301. The People v. Goodwin, 17 John. R. State v. Woodruff, 2 Day's R. 504. Commonwealth v. Bowden, 9 Mass. 494.

542. CO. LITT. 299.

Butler & Baker's case, 3 Rep. 30; Winchester's case, 3 Rep. 5; Back v. Andrews, Prec. in Chan. 1. S. C.; 2 Vern. 120; 2 Eq. Ca. Abr. 230; Jackson v. Stevens, 16 John. Rep. 110.

Husband and wife cannot take by moieties during the coverture; and he has no power to sever the jointure, nor to dispose of any part of the land: each is seised of the entirety.

Oppo. Whittlesey v. Fuller, 11 Conn. 337. The husband and wife take as joint tenants in Connecticut.

543. CO. LITT. 352 b.

That no estoppel can be by recital.

Overruled in Lainson v. Tremere, 1 A. & E. 792; 2 ib. 278.

544. COKE v. MARTYN, 2 Atk. 3, dictum in, disapproved of. Byrne v. Frere, 2 Moll. Ch. R. 166.

545. COKE'S REPORTS.

'The 12th part is not so accurate as the rest, not having been published by him, but from his notes after his death. Per Holroyd, J. 4 B. & A. 614. So Mr. Hargrave, 11 St. Tr. 40 says they were posthumous and loose collection of papers neither digested nor intended for the press by the writer.'

546. COLE v. DAVIES et al., 1 Ld. Raym. 724, 725.

Denied by Ld. Kenyon; 3 Term. 261, 2, 'is a short note taken by Lord Raymond when he was very young; not even the name of the case is given.' To the same effect. Ld. Mansfield, 1 Burr. 36. See also Garland v. Carlisle, 3 Tytwh. R. 717; Balme v. Hutton, 471.

547. COLEMAN v. WOLCOTT, 4 Day, 388. Swift v. Stevens, 8 Conn. 431.

That the loss or destruction of an instrument is not a preliminary question for the Court; and the plaintiff is incompetent to prove the fact: the practice in Connecticut being for the plaintiff to aver, that defendant made the note; that it is lost or destroyed; that it is unpaid; and each of these facts is to be tried by the jury.

Oppo. Chamberlain v. Gorham, 20 John. 144. Donelson v. Taylor, 8 Pick. 390. Adams v. Leland, 7 ib. 62. Blade v. Noland, 12 Wend. 173, and cases cited.

548. COLE'S CASE CITED FROM PLOWDEN, 1 Hale's P. C. 425.

"If a man give another a mortal stroke, and he dies thereof within a year and a day, but mesne between the stroke and the death there comes a general pardon, whereby all misdemeanors are pardoned, this doth pardon the felony consequentially, because the act, that is the offence, is pardoned, though it be not a felony till the party die."

Denied in Case of Nicholas, Foster's Cr. L. 64; Commonwealth v. Roby, 12 Pick. 508, 9.

549. COLES v. BARROW, 4 Taunt. 754.

Doubted in Nias v. Adamson, 4 B. & A. 225—Best, J.:—"And, besides, if Mr. J. Lawrence had continued in the Court of C. P. that decision would not have been pronounced. It is not, therefore, entitled to any great weight. The authority of that case is much broken in upon by the case of Hesse v. Stevenson, 3 B. & P. 578.

550. COLES v. COLES, 15 John. 11.

Denied in Sigourney v. Munn, 7 Conn. 18, as to the opinion expressed *obiter*, 'that the principles and rules of law, which govern and regulate the disposition of the partnership property, do not apply to real estate, even when held for the purposes of the partnership.' Edgar v. Donally, 2 Mumf. 387, is an express decision against it.

551. COLES v. TRECOTHICK, 9 Ves. 246.

Ld. Eldon declared, that unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive evidence of fraud in the transaction, it is not a sufficient ground for refusing a specific performance. And Ch. J. Savage, (3 Cow. p. 517,) says—"To

him may be added Sir Wm. Grant, Ld. Keeper Wright, and probably some others, who support the doctrine of Ld. Eldon.

Denied in Seymour v. Delancy, 3 Cowen, 446. 517. 572.

552. COLLAM v. HOCKER, 1 Rawle, 108, and Shepherd v. Watson, 1 Watts, 36.

That evidence to prove a mistake in the description; as that although a particular tract of land was included in the agreement or deed, yet the land which was in fact to be conveyed, was distinctly shown or pointed out to the vendee before the instrument was written, was not admissible.

Overruled in Bowman v. Bittenbender, 4 Watts, 290. S. P. King v. Stubbs, 14 S. & R. 206, and Moon v. Gillespie, 2 J. Ch. R. 385.

553. THE COLLEGE OF PHYSICIANS, Littleton's R. 212.

Held, though the time in a temporary law is expired, yet if it be continued, acts are to be laid as done by the last law.

Overruled in Dominus Rex v. Morgan, 2 Str. 1066; Shipman v. Henbest, 4 T. R. 109; Dingley v. Moor, Cro. Eliz. 750. But see Foster's case, 11 Co. 56.

554. COLLET v. COLLET, 2 Dall. 294.

Held, that naturalization was not confined to the U. States; the States also might naturalize aliens.

Overruled in Golden v. Prince, 3 Wash. C. C. R. 313; Chirac v. Chirac, 2 Wh. R. 269.

555. COLLETT v. HAIGH, 3 Camp. 281.

Overruled in Fentum v. Pocock, 5 Taunt. 195. Mansfield, C. J:— "The case of Collett v. Haigh, must be considered, not as a separate decision, but as resting on the authority of the former." (Laxton v. Peat.)

556. COLLINS v. BUTLER, 2 Str. 1087.

If the drawee has merely removed from the place, which the bill represents him to reside, it is incumbent on the holder to use every reasonable diligence to find out where he is, and if he succeeds, to present it at that place.

Limited in Gillespie v. Hannahan, 4 M'Cord, 503.

557. COLLINS v. COLLINS, Burr. 820.

S. P. as in Elliot v. Davis, (post.)

558. COLLINS v. GRIFFITH, 2 Eq. Cas. Ab. 168.

That an obligee of a joint and several bond need not bring before the court all the co-obligors.

Overruled in Angerstein v. Clark, 2 Sw. 147.

559. COLLINS v. OUGLEY, before Lord Holt, in 9 Wm. 3; Selw. N. P. 1164.

"If goods were delivered to a manufactory, he might detain them for what he deserved for his labor, *but if there was an agreement for the price, he could not;* in that case he must rely upon the contract, and be in the same condition with other creditors."

Denied in Kaitt v. Mitchell, 4 Camp. R. 150, note.

560. COLSTON v. NICKOLS, 1 Har. & J. 105. 2 Hayw. 340.

That evidence of unsworn declarations of a witness were admissible to impeach his competency.

Overruled in Stimmel v. Underwood, 3 Gill. & J. R. 282.

561. COLUMBIAN INS. CO. of ALEX. v. LAWRENCE, 2 Pet. R. 25.

Overruled in Ætna F. Ins. Co. v. Tyler, 16 Wend. 385 and *cases cited:*—and settled, that if there is a formal defect in the preliminary proofs required by a policy of insurance or the custom of the place, and which have been supplied, if the insurers do not call for the evidence, but put their refusal to pay on other grounds, they shall be considered as waiving the production of the evidence. See also 10 Pet. R. 507.

562. COLVIN v. NEWBURY, 8 B. & C. 166.

In reference to the liabilities of ship-owners to shippers of goods; and the effect of a charter-party to make the freighter the legal owner of the ship *pro tempore.*

Reversed in Newbury et al. v. Colvin et al., 7 Bing. 190. (In the Exch. Chamber).

563. COLWELL v. CHILD, 1 Rep. Cha. 104. 1 Ca. Chan. 86.

Overruled in M'Caw v. Blewit, 2 M'Cord Ch. R. 104. (*semble.*)

564. COMBER v. HILL, 3 Str. 969. Ca. temp. Hardw. 22.

That where remainders were limited to two and the heirs of their respective bodies, cross remainders were not to be implied.

"As to the word 'respectively,' the cases which have founded themselves on the distinction of that expression must now be considered as having been overruled." Per Lawrence, J. in Doe ex dem. Gorges v. Webb, 1 Taunt. 239. Vid. also Watson v. Faxon, 2 East, 36; Wright v. Holford, Cowp. 31.

565. COMBERBACH'S REPORTS.

Carthew and Comberbach are said by Ld. Thurlow to be equally bad authority. 1 Bro. Ch. C. 97.

But Ld. Kenyon says that Carthew is, in general, a good reporter. 2 D. & E. 776.

Buller J. said, Comberbach and Noy were books of no authority. Clarke's Bib. Leg. 355.

566. COMBE'S CASE, 9 Coke R. 236.

An attorney in executing a power, must do it in the name of his principal; otherwise the deed will be void.

Doubted in 1 Bac. Ab. vol. 1, p. 319, 320, note. 'That although the attorney must execute his power in the name of his principal, no particular form of words is required to be used, so as it appears to be the act of the principal. Hence signing a deed M. W. for J. B. is as good as J. B. by his attorney M. W. Wilks v. Back, 2 East, 142. But see and examine the case in East, and the observations in 3 vol. Amer. Jurist, p. 82 to 86; Fowler v. Shearer, 7 Mass. 14.

567. 1 COMMENTARIES ON EQUITY JURISPRUDENCE, p. 475. sec. 497. "if one of the *sureties* dies, the remedy at law lies only against the surviving *parties;* but in equity it may be enforced against the representatives of the deceased *party*, and he may be compelled to contribute to the surviving *surety*, who shall pay the whole debt."

Explained in Kennedy v. Carpenter, 2 Whart. R. 364.—"That *joint debtors* merely are meant."

568. COMMONWEALTH v. COOPER, 15 Mass. R. 187.

Where one is indicted for a rape, and the jury cannot agree to convict him, they may find him guilty of an assault with an intent to commit a rape.

Overruled in Commonwealth v. Roby, 12 Pick. 507.

569. COMMONWEALTH v. JONES, 1 Leigh's R. 598.

As to a new trial in a capital case.

Doubted in U. States v. Gibert, 2 Sum. R. 52.

570. COMMONWEALTH v. M'CAUL, Virg. Cas. 271.

The court should guard against the possibility of abuse, by setting aside the verdict, if any of the jury depart from the control of the officer.

Denied by Woodworth, J. in The People v. Douglass; 4 Cowen, 24, 5; "The English cases are uniform, that though the jury separate, if there be no farther abuse, this shall not vitiate the verdict: and we think the English cases are founded on the better reason."

571. COMMONWEALTH v. MURPHY, 14 Mass. R. 387.

That the credit of a female witness may be impeached by evidence of prostitution.

Overruled in Jackson v. Lewis, 13 John. R. 504; Gilchrist v. M'Kee, 4 Watts, 380; and in Commonwealth v. Moore, 3 Pick. 196, it was questioned.

572. COMPTON v. JONES, 4 Cowen, 13.

S. P. as in Fenner v. Mears, (post.)

573. COMSTOCK et al. v. APTHORPE et al., 1 Hopk. Ch. R. 143. 147 to 149.

Reversed 8 Cowen, 386.

574. COMYNS v. BOYER, Cro. Eliz. 485.

Though there be a penalty for selling at a fair on Sunday, the sale is nevertheless valid.

Overruled in Drury v. Defontaine, 1 Taunt. 131, on the ground that the st. (29 Car. 2) only prohibits business or work of *their ordinary callings*. The court however say, that if any act is *forbidden* by statute under a *penalty*, a contract to do it is void.

575. 1 COM. DIG. ACTION, F., case decided by Hale at Norfolk, in 1662; 1 Roll. Abr. 29, 1, 36.

Denied by Spencer, J. in 12 John. R. 168.—"is a very unreasonable decision."—"These are cases decided before the courts adopted the true method of considering contracts, in relation to their dependency, or independency."

576. COM. DIG. ACTION ON THE CASE FOR DEFAMATION. (F.) 2 F. (4.)

Doubted in Tomlinson v. Brittlebank, 4 B. & Adol. 630. Parke—"The cases under that head in Com. Dig., as to taking words *in mitiori sensu*, have been very much criticised, as going into too great minuteness." See Button v. Heywood; 8 Mod. 24; Slowman v. Dutton, 10 Bing. 402.

577. COM. DIG. DISTRESS, (B. 2.)

That the goods of a stranger cannot be distrained for the arrears of a rent-charge. Denied in Saffery v. Elgood, 3 New. & M. 346.

578. COM. DIG. EVIDENCE, A. 5.

"A verdict in another action for the same cause shall be allowed in evidence between the same parties. So, it shall be evidence, where the verdict was for one under whom any of the present parties claim."

Limited in Doe v. Derby, 1 Ad. & El. 783—Littledale, J.:—"But that must mean a claim acquired through such party subsequently to the verdict: (See Loch v. Norborne, 3 Mod. 141.)"

579. CONCANEN v. LETHERIDGE, 2 H. Bl. 38.

The plaintiff may recover in case against the sheriff for taking insufficient sureties in a replevin bond, damages beyond the penalty of the bond, i. e. for more than double the value of the goods distrained.

Overruled in Paul v. Goodluck, 2 Bing. N. C. 222; Evans v. Brander, 2 H. Bl. 547; Hefford v. Alger, 1 Taunt. 220.

580. CONSEQUA v. FANNING, 3 J. Ch. R. 587.

Reversed in 17 John. R. 511.

581. CONSTITUTIONAL COURT REPORTS, (Treadway) 2 Vols.

Denied in 1 M'Cord, Ch. R. 179; "Gaillard Chan. Is that book authority? There is but one equity case in the book, and it is falsely reported." Yet, it is seen that Nott, J. in that very case cites the same book without repudiating its authority.

582. CONVERSE v. FERR, 11 Mass. R. 326.

"At common law, no action lies by one tenant in common, who has expended more than his share in repairing the common property, against the deficient tenants, &c."

Doubted. See Doane v. Badger, 12 Mass. 70, 71, and see 2 Sto. Eq. J. 484. n. (1.)

583. CONVERSE v. SYMMES, 10 Mass. R. 378.

It was said—"Where the right is not wholly in one, and where the action depends on a title, which is alleged to be in one, but is proved to be in two or more; and it so appears by the pleadings, or in the progress of the suit, (1 B. & P. 70);—the variance is fatal.

Overruled in Thompson v. Hoskins, 11 Mass. R. 419—Parsons:—"This observation was made in answer to some authorities relied upon by the defendant: upon consulting which and some others not then cited, it is manifest that, even in the case of plaintiffs, an omission of one or more does not go to destroy the action (in tort,) without a plea in abatement; unless in actions upon contract, in which the law seems to be, that a failure to join all those who ought to be plaintiffs in the suit will cause a nonsuit, or even an arrest of judgment, if the defect appear of record, although it be not pleaded in abatement."

584. CONWAY v. GRAY, 10 East, 543.

Overruled in Flindt v. Scott, 5 Taunt. 674, and Baret v. Meyer, 5 Taunt. 824.

585. COOKE v. BOOTH, Cowp. 819.

Overruled. Iggulden v. May, 2 N. Rep. 452; 7 East, 237, S. C.; 9 Ves. Jr. 325. See United Society v. Eagle Bank, 7 Conn. 479—Hosmer.

586. COOKE v. COOKE, 2 Vern. 36.

Story, J. in 4 Mason, 42:—"But it is a very short and loose note."

587. COOK v. FOUNTAIN, 3 Swans. R. 585.

"The law never implies; the court never presumes a trust, but in case of absolute necessity."

Explained in 2 Sto. Eq. 6. 439.

588. COOKE v. MUNSTONE, 4 B. & P. 351.

Held, that plaintiff could not recover back the money paid as earnest on a contract to deliver a certain quantity of *soil* which defendant had wrongfully refused to deliver, under the general counts, because the special agreement was still in force, although he was prevented from recovering on the special count, on the ground of a variance between it and the special agreement.

Doubted in Mead v. Degolyer, 16 Wend. R. 417—Bronson:—"It did not lie with the defendant to object that the special contract was still in force after he had refused to perform it."

589. COOKE v. OXLEY, 3 T. R. 653.

Shaken in Adams v. Lindsell; 1 B. & Ald. 681.

590. COOK v. SWAN, 5 Conn. R. 140.

Overruled in Olmsted v. Hoyt, 11 Conn. R. 376.

591. COOK v. WISE, 3 H. & Munf. 463, 501.

In debt for rent in arrear, interest is not recoverable.

Oppo. Obermyer v. Nichols, 6 Binn. 159; Clark v. Barlow, 4 J. R. 183; Dorrill v. Stephens, 4 M'Cord, 59.

592. COOKSON v. ELLISON, 2 Bro. Ch. Rep. 252.

Denied by Ld. Kenyon in Newman v. Godfrey, 2 Bro. Ch. 332 and by Ld. Loughborough in Jerrard v. Smart, and Shaw v. Ching, 11 Ves. 288. 296. 303; and Methodist Episcopal Church v. Jaques, 1 John. Ch. Rep. 65.

593. COOPER v. CHITTY, 1 Burr. 36.

"With respect to what is supposed to have been said by Lord Mansfield in Cooper v. Chitty, of Comberbach's having mistaken Ld. Holt's opinion in Lechmere v. Thorowgood it is as probable that the report of that observation is mis-stated." Per Ld. Kenyon, 4 D. & E. 412.

594. COOPER v. SMITH, 9 S. & R. 26.

S. P. as in Chambers v. Furey, (ante).

595. COOPER v. SPENCER, 1 Stra. 641; 8 Mod. 376, S. C.

The omission of the *similiter* is ground for arrest of judgment after verdict.

Overruled 3 Burr. 1793; 2 Bing. 384, 6 Greenl. 327; 2 Day, 392; 9 Mass. 533: It may be amended as a matter of *course* after verdict, for being only matter of *form;* and as such, would seem to be aided by verdict.

596. COPPIN *qui tam* v. CARTER, 1 Term, 462.

Denied in Stils v. Toby, 2 Mass. 522:—Parsons Ch. J. observed, "that the issue joined in this was on the plea of not guilty, probably on the dictum in the case of Coppin v. Carter, but the old plea of *nil debet* (in debt for a penalty) was the safest; and that upon the plea of not guilty, if the jury find the defendant guilty, they ought also to find the forfeiture."

597. CORBETT v. POELNITZ, 1 D. & E. 5.

That a feme covert, living apart from her husband and having a separate maintenance, may sue and be sued as a feme sole.

Overruled in Marshall v. Rutton, 8 D. & E. 545.

598. CORDAL'S CASE, Cro. Eliz. 315.

Denied in Park on Dower, p. 64, and cases cited.

599. CORDELL v. NODEN, 2 Vern. 148.

Never followed since; and now overruled. Clennell v. Lewthwaite, 2 Ves. Jr. 465. 471; Smith v. Fitzgerald, 3 Ves. & Beame, 2.

600. CORNELL v. COOK, 7 Cowen, 310.

In trover sued by the officer, his own return on the execution was *prima facie* evidence of the levy against a creditor who had levied upon the same property.

Oppo. Merrill v. Sawyer, 8 Pick. 397.

601. CORNISH v. CAWSEY, Alleyn, 77; Sty. 118.

Overruled in Pugh v. D. of Leeds. Cowp. 719.

602. CORNWALL v. RICHARDSON, 1 Ry. & Mo. 305.

In an action of slander for imputing felony with a count for maliciously charging plaintiff with theft before a justice, to which defendant pleaded the general issue, and also pleas in justification of the slander, averring that the charge of felony was true: Held, that evidence of general character was not admissible for plaintiff.

Overruled in Harding v. Brooks, 5 Pick. 244:—The court say—Though we find no authority directly in point against the admission of such evidence under the general issue; on the contrary *Ld. Alvanley*,

held that it was admissible:—Yet, the rule is different, where defendant places upon the record a justification of the words.

603. CORNWALLIS v. SPURLING, Cro. Jac. 57.

Overruled. Fossett v. Franklin, T. Raym. 225; Elliot v. Starr, 1 Freem. 299.

604. CORPORATION OF BARNSTABLE v. LATHEY, 3 D. & E. 303.

Suit by the corporation for toll, and the defendant obtained a rule for inspection of such muniments, &c. of the corporation as related to the matter.

Overruled in The Mayor of Southampton v. Graves, 8 D. & E. 590.

605. CORPOR. DE SUTTON COLFIELD v. WILSON, 1 Vern. 254.

S. P. as in Burton v. Hinde, (ante).

606. CORPORATION OF SUTTON COLFIELD v. WILSON, 1 Vern. R. 254.

Has been thought to decide that a mere cross-examination of a witness upon the merits is a waiver of any objection to his competency.

Overruled in Moorhouse v. De Passou, 19 Ves. R. 433; S. C. Cooper R. 300. See also Gass v. Stinson, 2 Sumn. R. 611, 612.—Story.

607. COSTER v. LORILLARD, 265. 294, *et seq.*

Doubted, it seems, by Chan. Kent in 4 K. Com. 309. a. (b):—"Ch. J. Savage, in the great case of Coster v. Lorillard, decided in the Court of Errors of New York, in 1835, was led to make some observations on the third class of active trusts, allowed by the statute, which are rather startling, and calculated to increase our regret at the legislative attempt to reduce all trusts to the three specific objects mentioned."

608. COSTER & al. v. MURRAY, 5 J. Ch. 522.

That the weight of authority seemed in favor of applying the statute of limitations to open merchants' accounts, when the last item is more than six years before the commencement of the suit.

Denied in M'Clellan v. Crofton, 6 Greenl. 343.—Mellen. See 20 J. R. 576.

609. COTTEREL v. DUTTON, 4 Taunt. 826.

Denied in Griswold v. Butler, 3 Conn. 244.—Bristol—As to some *obiter dicta* in the case; if intended as reported shake its authority.

610. COTTON v. DAINTRY, 1 Ventr. 30.

That a writ of error is a supersedeas from the sealing of it.

Denied in Meriton v. Stevens, Willes, 275.

611. COTTON v. JAMES, 1 Mo. & M. 273.

In trespass for entering plaintiff's dwelling house and taking his goods on a plea justifying the trespass by proceedings under a commission of bankruptcy, and replication taking issue on the act of bankruptcy, the defendant is entitled to begin.

Doubted in S. C. p. 278, note:—"This case seems to complete the series of those by which the doctrine that the plaintiff is entitled to begin, where he has to prove damage sustained, have been for the present overruled."—"The practice appears now to be completely settled by decisions; but there are some circumstances which render it rather doubtful whether it will long continue."—And Lord Tenterden in S. C. says—"The rule as established in practice, is, that when the general issue is not pleaded, and the affirmative of the issue lies on the defendant, he is entitled to begin. I do not say that this is the most convenient rule; I am by no means sure that the practice is founded on the best principle; but it is established, and I do not think I ought to depart from it."

612. COUCH v. ASH, 5 Cowen, 265 and Hubert v. Williams, ib. 537.

Seem to decide, that a debt due by an insolvent as well as a bankrupt, is not a debt due in conscience, and is not a sufficient consideration for a new promise to pay the debt.

Oppo. Earnest v. Parke, 4 Rawle, 452. Scouton v. Eislord, 7 John. R. 36, and Shippey v. Henderson, 14 John. R. 178.

613. COULSON v. JONES, 6 Esp. 50.

Overruled in Webber v. Venn, Ry. & M. 413; Duncan v. Grant, 4 Tyrw. R. 818; and settled, that where any plea is pleaded besides the general issue, a notice of set-off will not enable the defendant to give in evidence the matters of his set-off under 2 Geo. 2, c. 22, s. 13. See 2 D. P. C. 683. (Ry. & M. 413 acc.)

614. COULTER'S CASE, Cro. Eliz. 630; 5 Rep. 30. S. C.

In 2 H. Bl. 23, it is said that judgment was never rendered in this case, and that Croke is mistaken.

615. COUNDEN v. CLERKE, Hob. 31, 2d point.

Overruled. Godbolt v. Freestone, 3 Lev. 206; Abbot v. Burton, 2 Salk. 591; Harris v. Bp. of Lincoln, 2 P. Wms. 139.

616. COUNTESS of RUTLAND'S CASE. 1 Roll. Abr. 5 (L) pl. 1. cited 2 Phill. Ev. 224.

Held, if a conversion has once taken place, it cannot be cured.

Overruled in Hayward v. Seward, 1 Mo. & Scott, 459, if a demand and refusal amount to a conversion:—The Court say however, that a

demand and refusal is but evidence of a conversion; and the refusal will be cured by the offer subsequently made, before the issuing the writ, to restore the property.

617. COURT FOR THE CORRECTION OF ERRORS IN N. YORK.

Spencer, J. (14 J. R. 104) says—"The manner of collecting decisions in that court, unfortunately, in almost every case, where several opinions are given, leave it doubtful what is the decision in any given case."

618. COVENEY'S CASE, Dyer, 209.

——"it is reasonable to suspect that case not to be law, when the instance is impracticable which it is brought to prove." Per Ld. Holt in Philips v. Bury, cited 2 D. & E. 346.

619. COVENHOVER v. SHULER, 2 Paige Ch. R. 122.

Doubted in Evans v. Iglehart, 6 Gill. & J. 171. 193, 4.—Dorsey.—"The case in 2 Paige, seems to have been decided simply upon reference to some English authorities; the opinion of Ch. Kent, establishing a different doctrine in Westcoat v. Cady, 5 J. Ch. 334, being entirely overlooked."

620. COWANS v. ABRAHAMS, 1 Esp. 50.

That in trover for a bill of exchange, Deft. must have notice to produce it, before the Plaintiff could go into proof of its being in Defendant's possession.

The authority of this case is considerably shaken by Bucher v. Jarratt, 4 Bos. & Pul. 143. Vid. also Aickle's case, 1 Leach C. L. 330. and Jolley v. Taylor, 1 Campb. 143.

621. COWELL v. WATTS, 6 East, 405.

Denied in Kline v. Guthart, 2 Pen. R. 494—Gibson, C. J.—See, Bull v. Palmer, (ante.)

622. *COWELL'S INTERPRETER.*

'Dr. Cowell's Interpreter is frequently cited by the English antiquarians, and Mr. Selden makes much use of it in his notes to Fortescue. It is one of the authorities use by Jacob in compiling his law dictionary. While the writings of Coke have descended with fame and honor to posterity, it was the fate of the learned labors of Dr. Cowell to pass unheeded and unknown, into irreclaimable oblivion.' 1 Kent's Com. 508.

Coke not only attacked, *The Interpreter*, but is said to have taken all occasions to affront him, calling him in derision, Dr. *Cow-hell.* Biog. Brit. Art. *Cowell.*

623. COWNE v. DOUGLASS, 1 M'Clel. & Y. 321.

S. P. as in Blake v. Foster, (ante.)

Oppo. Harrison v. Hollins, 1 Sim. & Stu. 471. See Math. Presump. Ev. 333 n. (d).

624. COWPER v. TOWERS, 1 Lutw. 98.

If a plea in bar, or replication, erroneously conclude to the country, when it should conclude with a verification, it is bad on general demurrer.

Overruled in Carthane & al. v. Clarke, 5 Leigh R. 268, 275.

625. COXE v. DAY, 13 East, 118.

Oppo. to Hotley v. Scot, reported in Lofft, 316, and more correctly MS. 7 Price, 503. "This earlier case was certainly unknown to the counsel by whom Coxe v Day was argued, and probably to the Court also; so that the decision in Coxe v. Day is not wholly free from question as to its particular circumstances." Abbott, C. J.—Dallas, C. J. (C. B.) dissenting from the judgment of the court in *dernier resort* says; "still, I think, it is not to be relied on strictly as a perfect authority, even in favor of my view of the subject: first, because if Hotley v. Scot be rightly reported, it would be in opposition to Coxe v. Day; and thus we should only have case against case. Nothing of authority can result from two cases decided by the same court in opposition to each other."

626. COX v. HART, 2 Burr. 758.

Oppo. Wyatt v. Markham, Barnes, 221. See also Smith v. Sterling, 3 Dowl. Pr. R. 609.

627. COXALL v. SHARPE, 1 Keble, 937.

Arbitrators have no authority to meddle with the title to land only, but such award is void.

Denied in Jones v. Boston Mill Corpo., 6 Pick. 148; Shelton v. Alcox, 11 Conn. R. 240; Sellick v. Addams, 15 J. R. 197; Cary v. Wilcox, 6 N. H. R. 177.

628. CRANE et al. v. FRENCH et al., 1 Wend. 311; 9 ib. 427. S. P.

Difficulties in those cases as to entering judgment are obviated by Stat. of Apl. 29, 1833. Pardee et al. v. Haynes et al., 10 Wend. 630.

629. CRANMER v. GERNON, 2 Pet. Ad. R. 391. S. P. as in the Cynthia, (post)

630. CRAWFORD v. WILSON, 2 Con. R. 353.

S. P. as in Timrod v. Shoolbred, (post.)

631. CRESSEY v. KELL, 1 Wils. 120.

Overruled in Lewis v. Pottle, 4 D. & E. 570.

632. CRESSWELL v. BYRON, 14 Ves. 271.

Ld. Eldon—" I do not know that a solicitor, whatever may be his reasons for declining to proceed, can claim a lien, if he does not carry the business through to a hearing." " The C. B., when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill."

Doubted in Vansandau v. Browne, 9 Bing. 402. Held, that he may for reasonable cause and notice abandon the cause and recover his costs.

633. CREEUZE v. HUNTER, 2 Ves. Jun. 157—dictum as to interest.

Doubted in Maghee v. Mahon, 1 Moll. 151.

634. CROCKFORD v. WINTER, 1 Camp. R. 128, and De Bernales, 2 Camp. R. 426.

Denied in The People v. Gordon, 9 J. R. 71, and Reid v. Rensselaer Glass Factory, 3 Cow. R. 435, the Court saying, 'that the defendant, who retains and converts the money of another to his own use, should pay interest for that use.'

635. CROFT v. PITMAN, 1 Marsh. 269.; S. C. 5 Taunt. 648.

Oppo. Meredith v. Drew, 2 Moore & Scott, 116, and cases cited p. 119, n. (a).

636. CROFTON'S CASE, 1 Mod. 34.

That if a statute create a *new* offence, to be prosecuted " by bill, plaint or information," an indictment will lie, except there be negative words—as, " and not otherwise."

——" has been denied many times." Said per Ld. Mansfield in Rex v. Wright, 1 Burr. 543.

637. CROKE'S REPORTS:

3 Croke being cited, Keeling, J. in 2 Keble, 316 said, 'it were better that it had never been printed.' 'There has been a very incorrect edition of these varying from the other editions, and the dates are printed in numerical letters—M D C L.' Bridg. Leg. Bib. 88.

638. CROMACK v. HEATHCOTE, 2 B. & Bing. 4; 4 J. B. Moore, 357.

Communications made to an attorney are confidential, although they do not relate to a cause existing, or in progress, at the time they were made.

Oppo. Broad v. Pitt, 3 C. & P. 518; and Williams v. Mundie, R. & M. 34; 1 C. & P. 158.

639. CROMPTON'S PRACTICE.

'Many of the cases were partly collected by myself before I was at the bar; were never intended by me for publication, and were too loose to be relied upon.' Per Buller, J. in 5 Term R. 372.

640. CROMWELL v. OWINGS, 7 Har. & John. 57.

S. P. as in Ilsley v. Stubbs, (ante) in its fullest extent.

641. CROOKE v. BROOKING, 5 Vern. 106.

The concluding observation of the reporter, denied in Jackson v. Staats, 11 Johns. 350.

642. CROP v. NORTON, 2 Atk. 74; 9 Mod. 233.

Corrected, as to its general application, in Wray v. Steele, 2 Ves. & Beame, 388.

643. CROSBY v. PERCY, 1 Camp. R. 303.

Oppo. Thompson v. Miles, 1 Esp. R. 184. 1 Sug. on V. & P., p. 287. (Amer. ed.)

644. CROSBY v. WADSWORTH, 6 East, 611.

Grass growing cannot be sold by parol; it is a *sale* of an *interest* in land.

Doubted in Frear v. Hardenbergh, 5 John. R. 276—Spencer, J. See observations of Ch. J. Savage in Mumford v. Whitney, 15 Wend. 386, 7; 1 Sug. on Vend. 82, 83. Upon citing Evans v. Roberts, 5 B. & C. 829, Mr. Sugden remarks—"The determination of the courts to escape from the rule in Crosby v. Wadsworth, without overruling that case, renders it somewhat difficult to apply the law to individual cases."

645. CROVAT and WIFE v. COBURN, 3 M'Cord, 14.

Limited in Walker v. Briggs, 1 Hill's R. 125, to the point decided.

646. CROZIER v. BARTLETT, 15 John. 250.

Reversed in Bartlett v. Crozier, 17 John. R. 439; deciding that a civil action will not lie against an overseer of highways for neglecting to repair a bridge whereby the horse of the plaintiff was injured.

647. CROYSTON v. BANES and Symondston v. Tweed, Prec. in Chan. 208 and 374.

Denied by Ld. Loughborough, (2 H. Bl. 68), "do not seem fairly to admit any other construction than this, namely, that the court thought that, where a parol agreement was admitted by the defendant's answer, he might or might not take advantage of the statute at his option."

648. CRYGIER v. LONG, 1 J. Cas. 393; and Lawrence v. Bowne, 2 J. Cas. 225.

After appearance and pleading in chief, a defendant cannot object, the suit being upon a note, that it was commenced before the note was due.

Overruled in Osborne v. Moncure, 2 Wend. R. 172. (3 ib. 170).

649. CUD v. RUTTER, 1 P. Wms. 570.

Lord Parke said—" That a court of equity ought not to execute any of these contracts (to transfer South Sea stock), but to leave them to law, where the party is to recover damages," &c.

Denied in Bryan v. Lewis, 1 Ry. & M. 386.—Tenterden. See 2 Sto. C. on Eq. J. 30 and n. (a).

650. CUFF v. PENN, 1 M. & S. 21.

In contract for the sale of goods of the value of £10 : Held, that the time (in which, by the agreement in writing, the goods were to be delivered) might be extended by a verbal agreement.

Doubted by Parke, J. in Goss v. Ld. Nugent, 5 B. & Ad. 58. But see 1 Phil. Ev. 561, and 3. J. R. 520.

651. CULL & ux. v. SARMIN, 3 Lev. 66, cited in 5 Com. Dig. tit. Obligation, B. 4.

Explained in Waugh v. Bussell, 5 Taunt. 709, by Gibbs, C. J.: " The case in Levinz, when examined, is only because the plaintiff added an *e* final to the name of the widow *Sarmine*, and the Court say, mis-spelling will not vitiate an obligation. Chief Baron Comyn has certainly misunderstood that case."

652. CUMBER v. WAYNE, 1 Str. 426.

Giving a note for £5 cannot be pleaded as a satisfaction for £15.

Doubted in Heathcote v. Crookshanks, 2 T. R. 24. But see Fitch v. Sutton, (post); and Smith's Sel. Lead. Cases, 147.

653. CUNDELL v. PRATT, 3 Car. & P. 238.

Doubted in Fries v. Bougler, 7 Hals. 80. See Tucker v. Welsh, 17 Mass. 160; 9 Cowen, 625; 2 Penn. R. 728.

654. CUNLIFFE v. TAYLOR, 2 Price, 320.

Overruled in Masters v. Fletcher, 1 Young's Exch. R. 25.

655. CUNNINGHAM v. COLLIER, 4 Dougl. R. 233.

A person entering into a charter party in his own name on behalf of the government is personally liable.

Oppo. Unwin v. Wolseley, 1 T. R. 674. See Allen v. Waldgrave,

8 Taunt. 567; Gidley v. Palmerstone, 3 Bro. & B. 275; and this though the *agent may have affixed his own hand and seal.* Hodgson v. Dexter, 1 Cranch, 345; Dawes v. Jackson, 9 Mass. 490; Stinchfield v. Little, 1 Greenl. 231; Sheffield v. Watson, 3 Caines, 69; it is sufficient if the authority of the agent appears. See 15 J. R. 1.

656. CUPIT v. JACKSON, 13 Price, 721.

Where the co-existence of legal remedies raises no objection to a suit in equity.

Overruled. French v. Morgan, 2 Moll. 488.

657. CURLING v. LONG, 1 B. & P. 637.

Denied by Ld. Alvanley, in 3 B. & P. 430—"With great deference to that *dictum* of Ld. C. J. Eyre in the case of Curling v. Long, I think that capture and re-capture do not put an end to the voyage." (12 J. R. 385 acc.)

658. CURRIE v. WALTER, 1 Esp. 456, and 1 B. & P. 523.

That it is lawful to publish ex parte proceedings in the courts, viz. in K. B.; provided the proceedings are conducted openly, and the accounts are just and true.

Doubted by Abbott, C. J., (in Duncan v. Thwaites, 3 B. & C. 556), who says, "The case is of great authority in itself, and derives additional weight from the manner in which it is mentioned by Lawrence, J. in King v. Wright, (8 Term, 293.) It has not, however, received the sanction of subsequent judges. 5 Esp. 123, Heath, J.:—And we wish it not to be inferred from anything here said as to the distinctions between this case and Currie v. Walter, that we think the publication of *ex parte* proceedings even in this court to be a matter allowable by law."

659. CURTIS v. HANNAY, 3 Esp. N. P. C. 83.

Ld. Eldon is reported to have said, that 'he took it to be clear law, that if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might *return the horse and bring an action to recover the full money paid*;'—and proceeds to say 'if the horse is returned in a worse state than it would have been on discovery of the unsoundness, the purchaser will have no defence to an action for the price:'—And Starkie on Evidence, part IV. p. 645, adopts the inference from this—viz.:—that 'the vendee may refuse to pay the price, or recover it back if paid.'

Denied in Street v. Blay, 2 B. & Ad. 456. In Pateshall v. Tranter, 3 Adol. & El. 103, it was held, that the buyer of a horse warranted sound, may recover in a special action of assumpsit for a breach of the warranty, though he never returned the horse, and though he neglected to inform the defendant of the unsoundness for several months after it was discovered. The rule, therefore, that a vendee is bound to return the article as soon as he discovers the unsoundness, is confined to cases where he *is* bound to return it. See also Fielder v. Starkin, 1 H. Bl. 17; Kimball v. Cunningham, 4 Mass. 502.

660. CUTHBERT v. GOSTLING, 3 Camp. 515.

In trespass for breaking through the wall of the plaintiff's house, the defendant pleaded a license, to which the plaintiff new assigned excess; Held, that the workmen employed to do the work, were competent witnesses, for the defendant to disprove the excess, without being released.

Doubted. Wake v. Lock, 5 C. & P. 456: The driver of a carriage is not admissible in an action against his master, without a release. Perhaps, however, the cases are distinguishable. See 1 Phil. Ev. 130. n. 244.

661. GUTTING v. WILLIAMS, 1 Salk. 24.

That a judgment cannot be reversed in part and affirmed in part.

Overruled. Kent v. Kent, 2 Str. 971; Vid. also Bellew v. Aylmer, 1 Str. 188; Henriquez v. Dutch W. I. Company, 2 Str. 807; Frederick v. Lookup 4 Burr. 2018; Smith v. Jansen, 8 Johns. 111; Nelson v. Andrews, 2 Mass. 164; Waite v. Garland, 7 Mass. 453; Cummings v. Pruden, 11 Mass. 206.

662. THE CYNTHIA, 1 Pet. Ad. R. 204.—Peters.

"There can be no doubt of the principle that wages are due to seamen in cases of capture or wrecks, to the last port of delivery, and for half the time the vessel stayed there. This is the settled law in this court."

Overruled in Bronde v. Haven, 1 Gilpin, R. 592, 603.—Hopkinson: "It is the first reported decision on this point, unless we may regard as such an incidental dictum of the same judge in M. Bordman v. The Elizabeth, 1 Pet. Ad. 130."

663. DABNEY v. GREGG, 5 Viner's Abr. 40. pl. 55.

There are two mistakes in Viner's report of this case; viz. that the question arose on a covenant *of the wife before marriage*;—and that defendant was seized of other lands *in right of his wife*. Vid. Willes Rep. 150. S. C.

664. DA COSTA v. SCANDERET, 2 P. Wms. 170.

That where a policy is void for fraud in the insured, he may still have a return of the premium.

Overruled in Chapman v. Fraser, Park, 218.

665. DA COSTA v. PYM, Peake's Ev. ap. lxxxii.

Ld. Kenyon refused to admit proof of the bond in suit, by comparing the signature with other signatures proved to be defendant's.

But in Massachusetts such evidence is admissible. Homer v. Wallis, 11 Mass. 312. So in Connecticut. State v. Brunson, 1 Root, 297.

666. DALBY v. DORTHALL and WIFE, Cro. Car. 553.

Husband and wife may join in an action of conspiracy for malicious prosecution against them both.

Oppo. Harwood v. Parrott, 7 Mod. 104; Smith v. Dixon, 2 Str. 977.

667. DALE v. HALL, 1 Wils. R. 281.

Doubted by Story, J. Law of Bailm. p. 326.

668. DALE'S CASE, Cro. Eliz. 44.

He who sells a chattel without title, is not answerable to the purchaser, (from whom the property is recovered by the rightful owner,) unless he made an express warranty, or knew of the defect of his title.

Denied in Osgood v. Lewis, 2 Maryland R. 495, 520.

669. DANIEL v. CARTONY, 1 Esp. 274.

Overruled in Lowes v. Mazaredo, 1 Starkie, 385; Chapman v. Black, 2 Barn. & Ald. 588.

670. DANIELL v. DANIELL, 6 Ves. 297.

S. P. as in Brograve v. Winder, (ante).

671. DANIELL v. M'RAE, 2 Hawks' R. 590.

That endorsers on accommodation paper for the benefit of a third person, where there is no special agreement between such endorsers, and where neither is benefitted, are to be considered as co-securities.

Denied in Richards Adm. v. Simms, 1 Dev. & B. 48. The court say—"We unanimously take this occasion to say, that were it *res integra*, we could not sanction the principle. We should say, as has been said by the rest of the mercantile world, that the parties to accommodation, were to be governed by the same rules, as parties are governed, whose names are on other or business paper. Fentum v. Pocock, 5 Taunt. 192; Murray v. Judah, 6 Cowen, 484; 3 Kent Com. 86." The Court however, felt bound to follow that case as the established law in North Carolina; and held, that they were to be taken as co-sureties, although

by agreement one of the sureties was to have part of the proceeds of the note discounted, for which he was to give the principal his own separate bond, and that agreement was not made known to the other surety at the time of his endorsement.

672. DARCY v. CHUTE, 1 Cha. Ca. 21; S. C. 2 Ch. R. 245; 1 Eq. Ca. Abr. 63. pl. 1; Furson v. Penton, 1 Vern. 498.

Overruled it seems in Milbourn v. Ewart, 5 Term R. 384.

673. DAUBIGNY v. DAVILLON, 2 Anstr. 460.

Lately overruled in the Exchequer; but this last case questioned by Ld. Eldon. Aldbrecht v. Sussman, 2 Ves. & Beame, 323.

674. DAUDE v. CURRER, 1 Sid. 285.

The marginal note is, "although it appear that more money is paid than the statute allows, still the party ought to plead the usurious contract, and not demur."

Denied in Dearden v. Binns, 1 Man. & Ry. 135, n. (c).

675. DAVID v. ELLICE, 5 B. & C. 196; Lodge v. Dicas, 3 B. & A. 611.

A creditor of a firm, by assenting to an arrangement made between the partners, for the one who remains in trade, to take upon himself the debts of the late firm, does not discharge the retiring partner from liability.

Doubted, if not overruled, in Thompson v. Percival, 5 B. & Adol. 925; 3 Nev. & Mann. 167; Kirwan v. Kirwan, 4 Tyrwh. 491; Smith's Lead. Cas. 147.

676. DAVIS et al. v. BENBOW, 2 Bayl. R. 427.

In an action upon a lost note, the plaintiff is not a competent witness to prove the loss, although the existence of the note has been established by the testimony of other persons.

Oppo. Jackson v. Frier, 16 J. R. 195; Chamberlain v. Gorham, 20 ib. 144; Donelson v. Taylor, 8 Pick. 390; M'Niel v. M'Clintock, 5 N. H. 355. See Coleman v. Wolcott, (ante).

677. DAVIS v. GETTY, 1 Sim. & Stu. 411.

Overruled in Nichols v. Roe; 5 Sim. 156.

678. DAVIS v. LEWIS, 7 T. R. 17; Maitland v. Golding, 2 East, 436; Woodworth v. Meadows, 5 East, 4, 669.

The repeater of a slander may defend by giving the words as he heard them from the author, (naming him).

Denied in Dole v. Lyon, 10 J. R. 447; and in Inman v. Foster, 8 Wend. 606. See M'Pherson v. Daniels, 10 B. & C. 263; Ward v. Weeks, 7 Bing. 211.

679. DAVIS v. LIVING, 1 Holt, 275—Ch. J. Gibbs (in action of *tort*.)

That when the plaintiff has closed his case, if no evidence has been produced against any particular defendant, that it was discretionary with the judge, and not a matter of right which a party can claim, to discharge him by a verdict, so that he may be admitted a witness for his co-defendants.

Denied in Van Duzen v. Van Slyck, 15 John. R. 223 and Bates v. Conkling, 10 Wend. 392, affirming it to be matter of right which a party can claim.

680. DAVIS v. MILLER, 1 Call, 127.

S. P. as in Kennon v. M'Roberts (post).

681. DAVIS v. PACKARD, 6 Wend. 327, (in error).

Reversing judgment of S. C.; but S. C. reversed in U. S. S. C., 6 Peters, 41.

682. DAVIES v. WILLIAMS, 1 Simon's R. 5.

When one of several executors alone has proved, he may sue alone in equity and need not join the other executors though they have not renounced; and it was said, that the same rule prevails at law.

Doubted. 2 Williams, 627, 1174; Bro. Executors, 83; 1 Saund. 291, n. 4; Kilby v. Stanton, 2 Young & J. 75, 77. In the last case, two executors were appointed, one proved, the other declined to act; an action was commenced by the acting executor against a debtor to the testator, and the rule of law requiring all the executors to join, the action was brought in the name of all the executors. On a bill filed by the debtor, he obtained the common injunction for want of answer. The acting executor subsequently put in an answer, and on an affidavit that the other executor, who resided abroad, refused to act or to put in any answer, the court granted an order *nisi* to dissolve the injunction.

683. DAVIS v. WILLIAMS, Peck's R. 151.

The language of this decision tends to the conclusion, that although the holder of a bill may have sought diligently to ascertain from the most correct sources the residence of an endorser, and the post office to which his residence is nearest, nevertheless, if his information should be erroneous, and upon such wrong information he should direct the notice to the wrong post office, it is to be considered as no notice to the endorser, who is thereby released.

Denied in Nichol v. Bate, 7 Yerg. R. 305.

684. DAVIS' REPORTS.

Not authority. Latch, 238; Palm. 462; 4 Term, 194.

685. DAVISON v. MARCH, 7 East, 34.

Overruled in Edwards v. Dick, 3 Barn. & Ald. 496: Held, that an affidavit to hold to bail which states that defendant is indebted to plaintiff as drawer of a bill of exchange, is not sufficient, unless it is also stated that the bill is due.

686. DAVY v. MILFORD, 15 East, 559.

Overruled in Wadsworth v. Pacific Ins. Co., 4 Wend. R. 33, 39. The Chancellor says—"Since the decision of the K. B., in Davy v. Milford, it is considered as settled in that country, that if any distinct package or parcel of the memorandum article is totally destroyed or lost, the underwriter is liable as for a total loss, *pro tanto*."—It is now "a settled rule of American insurance law, that the underwriter is not answerable for any partial loss on memorandum articles, except for general average, unless there is a total loss of the whole of the particular species, whether the particular article is shipped in bulk, or in separate boxes, or packages."

687. DAY v. ARUNDEL, Hardr. 510.

Overruled. Milland's case, 2 Freem. 43; Wagstaff v. Read, 2 Ch. Ca. 156.

688. DAY v. EVERETT, 7 Mass. R. 145.

That a father may bind his minor son to service to others, for a consideration to enure to himself.

Denied in U. States v. Bainbridge, 1 Mason's R. 71; 2 K. Com. 263, *et seq.*

689. DAY v. NIX, 9 Moore's R. 159.

S. P. as in Greenleaf v. Cook, (post).

690. DEAN v. ALLALLEY, 3 Esp. 11.

Erections made by the tenant for mere agricultural purposes were allowed to be taken away by him at the end of his term; such erections being put upon the footing of erections for the benefit of trade.

But this doctrine is denied, and this case spoken slightly of by Lord Ellenborough in Elwes v. Maw, 3 East, 54.

691. DEAN & CHAP. OF FERNES, Davis R. 121.

That a corporation could only express its will in writing under the seal of the body corporate.

Overruled in The Bank of Columbia v. Patterson, 7 Cranch, 299; 8 Wh. 338; 2 K. C. 290 n. (b). and cases cited.

692. DEAN v. DICKER, 2 Str. 1250.

Wager policy held valid.—Not law in Massachusetts. Amory v. Gilman, 2 Mass. 1.

693. DEANE v. LITTLEFIELD, 1 Pick. 241, note.

Where the will purports to dispose of real estate; the words being sufficient for that purpose, no evidence out of the instrument can be admitted to prove the state of the testator's property.

Denied in Brown v. Thorndike, 15 Pick. 395, as to the latter part of the opinion stated; it 'was *obiter dictum*.'

694. DEAN v. PEEL, 5 East, 49.

Denied in Sargent v. ——, 5 Cow. R. 115. 'Dean v. Peel is the only case in which the right of the father, to maintain an action for debauching his daughter, *whilst under age*, has ever been denied; and that he considered it a departure from all former decisions upon the subject.' See Martin v. Payn, 9 J. R. 389.

695. DEANE'S CASE, Hutt. 125.

Overruled, March, 11.

696. DE BERDT v. ATKINSON, 2 H. Bl. 336.

That the rule requiring demand on the maker, and notice to the indorser, is applicable only to fair transactions, where the bill or note has been given for value, in the ordinary course of trade.

Bayley, on Bills, p. 136, says, "the Court appear to have proceeded on a misapplication of the rule which obtains as to accommodation acceptances," &c. which Chambre J. calls "a very sensible note." Leach v. Hewitt, 4 Taunt. 731; vid. Warder v. Tucker, 7 Mass. 449; Bond v. Farnham, 5 Mass. 170; see Lafitte v. Slatter, 6 Bing. 523; Chit. on B. p. 471, 2. and n. (k).

697. DE BERKON v. SMITH & LEWIS, 1 Esp. R. 29.

Ld. Kenyon:—"That though in point of fact, parties are not partners in trade, yet if *one* so represents himself, and by that means gets credit for goods for the other, that both shall be liable."

Denied in Mitchell v. Roulstone et al., 2 Hall, 351.—Oakley.

698. DE BUTTS v. BACON & al., 6 Cranch, 252.

This case was brought before the S. C. of U. S., on error, from the C. C. of Dist. of Columbia. It was a bill of foreclosure; and the defence was a plea of usury. The C. C. adjudged the contract to be usurious, and void.

Denied. Palmer v. Mead, 7 Conn. Hosmer, C. J.—"The case was probably decided on the local law of the state. In all events, all is in the

dark. The opinion and act of the court is in few words: 'Which decree, this court, after argument, affirmed.' In such a case, I cannot conceive it an authority."

699. DEEKS v. STRUTT, 5 T. R. 690.

No action lies at common law for a legacy, although it appear that the executor has assets sufficient, and though he has paid for several years the annuity for the arrears of which the action is brought.

Oppo. Van Orden v. Van Orden, 10 J. R. 30; Ewer v. Jones, 2 Ld. Raym. 937; S. C. 6 Mod. 26; 2 Salk. 415; Swasey v. Little, 7 Pick. 296.

700. DEVONSHIRE, (Earl of,) in Howel's St. Trials, vol. 11. Col. 1353.

Doubted by Abbott, C. J. in The King v. Taylor, 3 B. & C. 516, where he says; "I should be sorry to consider that case an authority for any thing."

701. DE GAILLON v. L'AIGLE, 1 B. & P. 357.

Overruled, as *it seems*, in Stretton v. Busnach, 1 Bing. N. C. 139.

702. DE KENTLAND v. SOMERS, 2 Root, 437.

Doubted in Coit v. Starkweather, 8 Conn. 295.—Daggett:—"No reasons are assigned, nor authorities cited."

703. DELAUNEY v. MITCHELL, 1 Stark. R. 439.

Held, that where the plaintiff had received a notice to prove the consideration of the note or bill, he ought to do so in his opening; he cannot do it in reply.

Overruled, see Chit. on B. 8th Am. ed. 638, n. (c).

704. DEL COL v. ARNOLD, 3 Dal. 333.

Overruled, in effect, in L'Invincible, 1 Wheat. 238.

705. DE LOVIO v. BOIT, 2 Gall. 398.

Story, J. "We are at liberty to re-examine the doctrines, and to construe the jurisdiction of the admiralty, upon enlarged and liberal principles."

Limited in Davis & Brooks v. The Seneca, Gilpin, 28, 29. Hopkinson, J. "But we are not to conclude from this, that we are to set no limits to it; or that we may do, under it, any thing that may seem to be convenient in any particular case; nor yet that we should not cautiously respect the English decisions by great and learned men, tainted perhaps, but not blended or corrupted, by prejudice."

706. DENNISON v. MODIGLIANI, 5 D. & E. 580.

That the taking of letters of marque by a merchant vessel avoids the policy, though no use be made of them.

The authority of this case is shaken in Moss v. Byrom, 6 D. & E. 379. In Massachusetts it is denied. Wiggin v. Amory, 13 Mass. 118.

707. DENN v. FERNSIDE, 1 Wils. 176.

1st resolution, that the grant of a freehold to commence *in futuro* was void.

"This old principle of law—has no good ground to stand upon, at this day." Per Pratt, C. J. in Freeman v. West, 2 Wils. 165.

708. DENNE v. SHERSTON, Cowp. 410.

That dying without issue upon a limitation of lands had never been confined to issue living at the time of the death.

Denied in Patterson v. Ellis, 11 Wend. 283, 4.

709. DENN v. DUPUIS, 11 East, 134; Purling v. Parkhurst, 2 Taunt. 237.

Denied in Horwood v. Underhill, 4 Taunt. 346.

710. DENTON v. STEWART, 17 Ves. 756; 1 Cox, 258; and Greenaway v. Adams, 12 Ves. 395.

Overruled in Gwillim v. Stone, 14 Ves. 128 and Jenkins v. Parkinson, 2 M. & K. 5; 1 Coop. Sel. Cas. 179; S. C. (8 Cond. 432.) See 13 Price, 750.

711. DE SOUZA v. EWER, Park, 361.

That the sentences of foreign Admiralty Courts were conclusive, though founded on the want of a document not required by treaty, nor by the law of nations.

Ld. Kenyon afterwards said he was satisfied he was mistaken in that decision, and consequently that it could no longer be considered as any authority. 8 D. & E. 444, note.

712. DEWES v. MORGAN, 1 Mart. Lou. R. 1.

S. P. as in Timrod v. Shoolbred, (post.)

713. DE WOLF v. JOHNSON, 10 Wheat. R. 367.

Overruled in Lloyd v. Scott, 4 Peters' R. 205, as far as the principle is there asserted, that the alienee of a mortgagor cannot avail himself of the defence of usury, to a bill of foreclosure by the mortgagee. See Trumbo, Ex. v. BLIZZARD, 6 Gill & J. 18.

714. DE WOLFE v. THE N. Y. F. INS. CO., 20 Johns. R. 214. 225. 229. Reversed in 2 Cowen, 56.

715. DEY v. DUNHAM, 2 J. Ch. R. 188.

Reversed in 15 John. R. 555; S. P. Dunham v. Gould, 16 ib. 367.

716. DICK v. BARRELL, 2 Stra. 1248.

Plaintiff insured on any ship he should come in, from Virginia to London, interest or no interest. The ship he sails in springs a leak, he removes to another, and arrives safely, but the first ship is taken. The insurer was held liable.

This case is treated by Marshall as entitled to no credit; [p. 376] and is shaken in Plantamour v. Staples, 1 D. & E. 611, n.

717. DICKENSON v. DICKENSON, 2 Murph. R. 279; Smith v. Williams, 1 ib. 426; Streator v. Jones, ib. 449.

Where an absolute deed is made, parol evidence is not admissible to prove that a deed was made under any special trust, and that a valuable consideration was not paid.

Doubted. See Coach v. Rosine, 227; Lock v. Whiting, 10 Pick. 279.

718. DICKENSON v. SHEE, 4 Esp. R. 68; 1 Arch. K. B. 4 ed. 331.

When a witness has been examined in chief, the counsel of the opponent, may put any question at all relevant to the cause he may think of it, and in a manner *however leading*.

Qualified. "Leading questions should never be put but when the witness is obviously anxious to conceal the truth." 3 Chitty's Pr. 900.

719. DICKEN'S REPORTS.

'From the author's official situation as Register of the Court of Chancery for many years, great expectations were formed by the bar, from his proposed publication:—*Sed parturiunt mortes*'—Bridgman's L. B. 96. And Mr. Sugden (Sug. Vend. 139, 2d ed.) 'The accuracy of the book being very questionable.' (1 Sch. & Lef. 240.)

720. DIGHTON v. GREENVILLE, 2 Ventr. 331.

Reversing, in Cam. Scac. the judgment in B. R. as reported in Skin. 26. But this judgment in Cam. Scac. was reversed in Dom. Proc. Cruise on Fines, 222.

721. DIXON v. SWIGGETT, 1 H. & J. 252.

Parol evidence cannot be given to prove the non-payment of the consideration money for lands sold and conveyed; the deed expressing that the consideration had been received.

Overruled in Higdon v. Thomas, 1 H. & G. 139; M'Crea v. Purmort, 16 Wend. 460.

722. DODDINGTON v. HALLET, 1 Ves. sen. 497.

That part owners of a ship, being tenants in common, and not joint

tenants, have a right notwithstanding to consider that as a chattel, used in partnership, and liable as partnership effects, to pay all debts whatever, to which any of them are liable on account of the ship.

Overruled in Young, Ex parte, 2 Ves. & B. 242; Daniel v. Russell, 14 Ves. 393; Merrill v. Bartlett, 6 Pick. 47; Nicoll v. Mumford, 4 J. Ch. R. 522: But see S. C. 20 John. R. 611. The better opinion is against the lien. Per Hopkinson, J. in Patton v. The Randolph, Gilp. R. 460.

723. DOE dem. BARRETT v. KEMP, 7 Bing. 332; 5 M. & P. 173.

Whether a slip of land between some old enclosures and the highway, vested in the lord of the manor or the owner of the adjoining freehold: Held, that evidence might be received of acts of ownership by the lord of the manor on similar slips of land not adjoining his own freehold, in various parts of the manor.

Reversed it seems in the Exchequer Chamber, 2 Bing. N. C. 102.

724. DOE ex dem. BLAKE v. LUXTON, 6 D. & E. 292.

That tenant *pur autre vie* with limitations over may defeat the limitations by will.

Doubted per Lord Redesdale in Campbell v. Sandys, 1 Sch. & Lefr. 294.

725. DOE v. BRABANT, 4 T. R. 709. note.

Denied by Woodworth, J. in 5 Cow. 224. who says 'the note is very short and unsatisfactory.'

726. DOE d. CHALLMER v. DAVIS, 1 Esp. R. 461.

Overruled in Bryan d. Child v. Winwood, 1 Taunt. 208.

727. DOE dem. CLARKE v. SPENCER, 2 Bing. 203, 370.

Doubted in Stokes v. Deey, 1 Moll. 597.

728. DOE v. ERRINGTON, 3 Nev. & M. 646.

Denied in Parker v. Edge, 3 Tyrw. 364; Hanbury v. Ella, 1 Adol. & El. 64.

729. DOE v. GOFF, 11 East, 668.

Overruled by Lord Redesdale in Jesson v. Wright, 2 Bligh. 2. See Ward v. Bevil, 1 Y. & J. 527.

730. DOE v. LAMING, 4 Camp. 73.

Doubted in Greenslade v. Tapscott, 4 Tyrw. R. 566—Parke, B. and Alderson, B. as to the ground taken by Ld. Ellenborough for his decision.

731. DOE v. LUXTON, 6 T. R. 292.

Doubted in Campbell v. Sandys, 1 Scho. & L. 295, as to a dictum of Ld. Kenyon.

732. DOE v. MANNING, 9 East's R. 59.

Held, that a voluntary conveyance will be set aside as fraudulent in favor of a subsequent purchaser for the value, though the latter had notice of the first deed.

Denied in Buckle v. Mitchell, 18 Ves. 110; Hudnal v. Wilder, 4 M'Cord, 294:—see also Sterry v. Arden, 1 J. Ch. R. 261; Ricker v. Ham, 14 Mass. 139. See 2 R. S. 137. s. 4.

733. DOE v. PASQUALI, Peake's N. P. C. 259.

A notice was held necessary when a tenant refused to pay rent to a devisee under a contested will.

Doubted in Doe d. Calvert v. Frowd, 4 Bing. 560;—a notice to quit is only necessary, where a tenancy is admitted on both sides.

734. DOE v. ROAKE, 2 Bing. 497—C. B.

A devisor being seized of a moiety of certain lands in S——, having by her own creation, a dower of appointment over the other moiety, which she had purchased of her nephew, who succeeded her sister in the possession of it,—and having no other real estate—devised all her freehold estate in S. to J. R. on condition that out of the rent and profits she should keep the whole in tenantable repair, and under limitations framed to keep the property as long in her family as possible:—Held, that this devise was, under the circumstances, a sufficient execution of the power, and that both moieties passed under it to J. R.

Reversed in Denn v. Roake, 5 B. & C. 720; affirmed in 6 Bing. 475.

735. DOE v. ROGERS, 5 B. & Adol. 755; 2 Nev. & Man. 550. S. C.

Doubted in Sug. on Pow. p. 417, (Lond. ed.) p. 226. et seq. (Am. ed.)

736. DOE d. SAVILLE v. EARL OF SCARBOROUGH, 3 Ad. & El. 3; 4 N. & M. 274.

Reversed in Earl of Scarborough v. Doe d. Saville, 3 Ad. & Ell. 897. The Exchequer Court holding that the recovery defeated the limitations expectant on the estate tail.

737. DOE v. SNOWDEN, 2 Bl. 1224, cited 2 East, 383.

Overruled by Ld. Kenyon, at N. P. in Doe v. Wilton, cited 2 Stark. Ev. p. 300. n. (x). Sed. see 2 East, 383.

738. DOE v. THOMAS, 9 B. & C. 288.

Mr. Sugden says, "the case is not accurately stated in the report." Sug. on Pow. p. 49, n. (k).

739. DOE v. WATTON, Cowp. 189.

That " from the day of the date" was exclusive. This case was afterwards overruled by Ld. Mansfield, who decided it, in Pugh v. D. of Leeds, Cowp. 714.

740. DOLIN v. COLTMAN, 1 Vern. 294.

Doubted by Atherley on marriage settlements, p. 162, and by Parker C. J. in Bullard v. Briggs, 7 Pick. 539, 540.

741. DONNELLY v. ROCKFELLER et al. 4 Cowen, 253.

Reversed in Rockfeller et al. v. Donnelly, 8 Cowen, 623.

742. DORMER v. FORTESCUE, 3 Atk. R. 134.

That betterments or improvements should be deducted in an action for the mesne profits.

Denied, Bank of Hamilton v. Dudley's Lessee, 2 Pet. R. 492 ; Russell v. Blake, 2 Pick. 505 ; Lombard v. Ruggles, 9 Greenl. R. 62 ; See Nelson v. Allen, 1 Yerg. R. 360.

743. DORMER v. THURLAND, 2 P. Wms. 506.

Power given to charge the premises with 2000*l.* by *will, or any writing in nature of a will, sealed and attested by three or more witnesses.* The premises were charged by will signed and attested by three witnesses, but not *sealed.* The Judges of B. R. determined that this was not a good execution of the power. But Ld. King thought it was;— " and I own," says Ld. Mansfield, " I should incline to his opinion." Earl of Darlington v. Pulteney, Cowp. 268.

744. DOUGLASS v. MOODY, 9 Mass. 548.

Overruled in 14 Mass. 66.

745. DOVE v. SMITH, 6 Mod. 153. *sub. fin.*

" Opinion of the reporter, not of Ld. Holt." Per Lawrence, J. 6 D. & E. 406.

746. DOWN v. HALLING, 4 B. & C. 330.

To the point in respect to a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained.

Overruled in Crook v. Jardis, 5 B. & Ad. 909 ; Buckhouse v. Harrison, 5 B. & Ad. 1098. Held, that nothing but *gross negligence* will prevent an indorsee from recovering. See Gill v. Cubitt, (post.)

747. DOWNHALL v. CATESBY, Moore, 356 ; (Swift's Dig. 141.)

Denied in Comstock v. Hadlyme, 8 Conn. 254—Williams,

748. DOWTHWAITE v. TIBBUT, 5 M. & S. 75—(3 Bing. 651.)

Overruled in A'Court v. Cross, 6 B. & C. 610.

749. DRADDY v. DEACON, 2 Vern. 242, cited in Hadley v. Clarke, 8 Term, 266.

"It is said (in Reed's Bib. Nov. 297, 8,) that Kenyon, C. J. observed, "that it had been an hundred and an hundred times lamented that Vernon's Reports were published in a very inaccurate manner."—"Mr. Vernon's notes were taken for his own use and never intended for publication. He was the ablest man in his profession."

750. DRAKE v. ROYMAN, Sav. 133.

That an executor cannot maintain trover, if the conversion was in the lifetime of the testator.

Overruled. Crosier v. Ogleby, 1 Stra. 60; Badlam v. Tucker, 1 Pick. 389.

751. DRANE v. HODGES, 1 Har. & M'Hen. 262; That an award cannot establish title to land.

Denied in Shelton v. Alcox, 11 Conn. 248—Williams, C. J.: The case "occurred in Maryland, before the revolution; seems a solitary exception to the current of American decisions."

752. DRAPER v. GLASSOP, 1 Ld. Raym. 153; Com. Dig. Pleader, (2 W. 17.)

The latter, in enumerating the cases in which the defendant may plead the general issue *nil debet*, to debt upon contract, not upon bond, says, "so, though the debt is barred by the statute of limitations, for he could not plead *nil debet infra sex annos*, but *nil debet* generally."

Overruled in Chapple v. Durston, 1 Cr. & Jerv. R. 1: Held, that the statute of limitations must be replied specially to a plea of set-off, and cannot be taken advantage of under the general replication of *nil debet*. See 1 Cranch, 465, app. Pearsall v. Dwight, 2 Mass. 84.

753. DREKE v. MAYOR OF EXON, 2 Freem. 183; Vandernanker v. Disbrough, 2 Vern. 97; Moyses v. Little, ib. 194.

Oppo. Doe d. Mitchinson v. Carter, 1 Y. & Jerv. 427; 2 ib. 572; 2 Rose, 86.

754. DREW v. BIRD, 1 Mo. & Malk. 156.

On a bill of lading of goods "shipped by A. B. to be delivered to C. D. or his assigns, he or they paying freight;" if the goods are delivered without receiving freight, the *shipper* is not liable for the freight, there being no charter-party.

Oppo. Barker v. Havens, 17 John. R. 234:—In this case, the shipper

was also the owner of the goods; in Drew v. Bird, supra, that fact does not appear in the report. See Howard v. Tucker, 1 B. & Ad. 712; and 3 K. C. 222, n. c.

755. DREW v. WADLEIGH, 7 Greenl. R. 94.

A written contract was admitted for the purpose of impeaching the witness on the stand, without calling the subscribing witness; the witness admitting his signing it.

Doubted. See 1 Phil. Ev. 465, note; Harris v. Wilson, 7 Wend. 57.

756. DRIVER v. THOMPSON, 4 Taunt. 294.

That a married woman may execute a power, whether appendant, in gross, or simply collateral, and as well over a copyhold as a freehold estate.

Doubted by Sugden (on Pow. p. 185, ch. 4, s. 1. no. 2.) "notwithstanding the decision in Driver v. Thompson, it deserves a re-consideration whether she and her husband can surrender *her* estate to the use of her will."

757. DRURY v. DEFONTAINE, 1 Taunt. 135.

Doubted by Mr. J. Park in Smith v. Sparrow, 4 Bing. 84:—"I do not think this Court was right in the decision of Drury v. Defontaine, 1 Taunt. 135. I think the construction put upon the statute in that case, too narrow." See Bloxsome v. Williams, (ante.)

758. DUBBER v. TROLLOPE, Amb. 453.

The words *heir male* in the singular number give the estate a descendible quality, and make it inheritable.

Doubted it seems by Mr. Preston, Tr. on Estates, 2 Vol. 8.

759. DUBOIS v. THE DELAWARE & H. CANAL CO. 12 Wend. 334.

The contract stipulates for the valuation of any *extra work* or other work necessary to the final settlement of the contract to be determined by an engineer; and yet held, that *hard-pan excavation* was not within the provisions of the contract:—and the contractor was entitled to recover upon a *quantum meruit*.

Oppo. Morgan v. Birnie, 9 Bing. 672—as it seems.

760. DUBOIS v. GROVE, 1 T. R. 112.

Doubted, in Hurlbert v. The Pacific Ins. Co., 2 Sumner, 471, 480, 481, Story, J. says,—"In Dubois v. Grove, (1 Term R. 112,) and Bize v. Dickason, (1 Term, 285,) the broker acted under a *del credere* commission, and having paid the losses to his principal, he was allowed to set off these losses against a claim for premiums by the assignees of a bankrupt. Under such circumstances, it may be fair, as between

himself and the underwriters, the policy being made in his name, and the amount being paid, to treat him as the owner of the policy. Moody v. Webster, (3 Pick. R. 424,) Koster v. Eason, (2 M. & Selw. 112,) and Parker v. Beasley, (2 ib. 423,) recognizing the like right of set-off where the brokers are under a *del credere* commission, or have a lien by reason of acceptances, (See also Davies v. Wilkinson, 4 Bing. 573.) But where there is neither a *del credere* commission nor a lien, the right of set off is held not to exist. Parker v. Smith, (16 East R. 382, 386.) It would, however, be a great mistake to consider Grove v. Dubois, (1 Term R. 112), from which all the other cases have sprung, an authority to the extent of considering, that where the broker acts under a *del credere* commission, he is to be considered as the primary debtor to his principal, and therefore, to all intents, the insured. In Baker v. Langhorn, (6 Taunt. R. 519), and Peele v. Northcote, (7 Taunt. R. 478), Ld. Ch. J. Gibbs repudiated such a notion. (See also Gall v. Comer, 7 Taunt. R. 558.) Without going farther into the examination of the English cases on this particular point, resting, as they mainly do, upon the case of Dubois v. Grove, a case in itself not very satisfactory in its principles, it is sufficient to say, that they furnish no general reasoning applicable to the case before the court."

761. DUBOIS v. LUDERT, 5 Taunt. 606; 1 Marsh, 248.

The non-joinder of a dormant partner may be pleaded in abatement.

Overruled in De Mautort v. Saunders, 1 B. & A. 396; Mullett v. Hook, 1 M. & M. 88. See 17 Ves. 412; 19 ib. 294.

662. DUBOSE v. WHEDDEN, 4 M'Cord R. 221. See Haine v. Tarrant, 2 Hill's R. 401:

Held, that an infant may bind himself, for necessaries: and it *seems*, even on a negotiable note, for necessaries, while in the hands of the original payee.

Oppo. Swasey v. The Adm. of Vanderheyden, 10 John. 33.

763. DUCKHAM v. WALLIS, 5 Esp. R. 252, (Hurd v. West, post.)

Ld. Ellenborough held, that the declarations of the payee, though made previous to the indorsement of the note were not admissible; it appearing that the note was indorsed after it was due.

Denied in Hatch v. Dennis, 1 Fairf. R. 249—Parris, J.—"From the recent cases in K. B. and C. B., it would seem that the ruling of Ld. Ellenborough is not now considered as law in England." Pocock v. Billing, 2 Bing. 269; Barough v. White, 4 B. & C. 325; Shaw v. Broom, 4 D. & Ry. 730; Beauchamp v. Parry, 1 B. & Ad. 89; Smith v. De Wruitz, Ry. & Mo. 212; Graves v. Key, 3 B. & Ad. 313. Sed see Whitaker v. Brown, 8 Wend. 490 (post). See Gibblehouse v. Strong, 3 Rawle, 452—Kennedy.

764. DUFFIELD v. ELWES, 1 Sim. & Stu. 239.

Held, that a bond and mortgage cannot pass as a *donatio causa mortis*.

Reversed, 1 Bligh's R. 497.

765. DUFFIT v. JAMES, 7 East, 480, n.

Overruled in Broom v. Davis, 7 East, 479, n.; Buller, (S. P. Cormach v. Gillis, 7 East, 481 n.); Morgan v. Richardson, ib. 482, n.; and held, in a case where a specific sum had been agreed upon and part paid, that inadequate execution was no defence, though the plaintiff was fully apprised of the fact.

766. DUGUET v. RHINELANDER, 1 J. Cas. 360.

Reversed in S. C. 2 J. Cas. 476.

767. DUMPOR'S CASE, 4 Coke, 119.

A condition, not to alien without license is determined by the license granted. Apportionment of conditions.

Commented upon in Smith's Lead. Cas. p. 68, thus:—"The profession have always wondered at Dumpor's case," said Mansfield, C. J., in Doe v. Bliss, 4 Taunt. 736, "but it has been law so many centuries that we cannot now reverse it." Though Dumpor's case always struck me as extraordinary," (said Lord Eldon in Brummel v. Macpherson, 14 Ves. 173,) "it is the law of the land." Accordingly it is affirmed by many subsequent decisions, nay, has been even carried further, for it is held that whether the license to assign be general, as in the principal case, or particular, as "to one particular person subject to the performance of the covenants in the original lease;" still the condition is gone, and the assignee may assign without license. Brummel v. Macpherson, 14 Ves. 173. But the license, in order to put an end to the condition, must be such a license as is therein contemplated, for where the condition is, not to assign without license in writing, a parol license is no dispensation. Roe v. Harrison, 2 T. R. 425; Macher v. Foundling Hospital, 1 V. & B. 191; Richardson v. Evans, 3 Madd. 218, though it is said that if such parol license were used as a snare, equity would relieve. Richardson v. Evans, 3 Madd. 218. It seems, too, that if the condition be not in general restraint of assignment, but permit the lessee to assign in one particular way, *ex gr.* by will; an assignee, to whom the lease had been transferred in the permitted way, cannot assign in any other mode. Lloyd v. Crispe, 5 Taunt. 249. "The ground of Dumpor's case" (says Gibbs, J.) "was this: the proviso was that the lessee or his assigns should not alien the premises to any person or persons without the special license of the lessors; the lease was therefore to be void if any assignment was made. And there the court was of opinion that if the condition was once dispensed with, it was wholly dispensed with, because the provision for making void must exist entire, or not exist at all. But here is an exception out of the original restriction to alienate, so that in the alienation by will made by the lessee there was nothing to license."

Although, when such a condition as that of Dumpor's case exists, alienation without license operates as a forfeiture of the term; still, if the lessor, with knowledge of the forfeiture, receive rent due since the condition broken,

such conduct upon his part operates as a waiver of his right to take advantage of it. In Goodright v. Davies, Cowp. 803, the lease contained a covenant not to underlet without license, and a power of re-entry to the lessor in case of non-observance of the covenants; the lessee underlet various parts of the premises, but the lessor knew of it, and received rent afterwards. "The case," said Lord Mansfield, "is extremely clear. To construe this acceptance of rent due since the condition broken, a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition the landlord had a right to enter. He had full notice of the breach, but does not take advantage of it, but accepts rent subsequently accrued. That shows he meant that the lease should continue. Forfeitures are not favored in law; and when a forfeiture is once waived, the court will not assist it." See Browning and Beston's case, Plowd. 133; Roe v. Harrison, 2 T. R. 425. And other acts of the lessor, besides acceptance of rent, have been held to waive a forfeiture, when they shew an intention on his part that the lease should continue. Doe v. Meux, 4 B. & C. 606; see Doe v. Birch, 1 Mee & Welsby, 408. It has been laid down, that there is a difference in this respect between cases where the lease is on a breach of the condition to be void, and those where it is only to be voidable on the lessor's re-entry. In the latter case, acceptance of rent operates as a waiver of the landlord's right to re-enter, but in the former, the lease becoming void immediately upon the breach of the condition, it has been laid down by great authorities that no subsequent acceptance of rent will set it up again. This distinction is laid down by Lord Coke, 1 Inst. 214, b., in the following terms: "Where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent after can make it to have a continuance, otherwise it is of a lease or estate voidable by entry." The same law is laid down equally strongly in Pennant's case, 3 Rep. 64; in Browning and Beston's case, in Plowden; see too Finch v. Throckmorton, Cro. Eliz. 221; Mulcarry v. Eyres, Cro. Car. 511; Doe d. Simson v. Butcher, Dougl. 51, *et notas*. But this distinction was never applied to any save leases for years, for if a lease for lives contain an express condition to be void upon the breach of any covenant by the lessee, still it is in contemplation of the law only voidable by re-entry; for it is a principle that an estate which begins by livery can only be determined by entry. Browning & Beston's case, Plowd. 133; Doe v. Pritchard, 5 B. & Ad. 765. Even in the case of a lease for years, where the direction is that it shall become void on breach of the condition; it will only be void at the option of the lessor; for the lessee shall not take advantage of his own wrongful non-performance of his contract, in order to destroy the lease, which had perhaps turned out a disadvantageous one. Doe v. Bancks, 4 B. & A. 401; Read v. Farr, 6 M. & S. 121; nor can any third person treat it as void until the landlord has declared his option. Roberts v. Davey, 4 B. & Ad. 664. In that case, in trespass *quare clausum fregit*, the defendant pleaded a license from a previous owner in fee. Replication, that the license was, on breach of a certain condition, "to cease, determine, and become utterly void and of no effect," and that the condition had been broken, and the license thereupon become void. Demurrer and judgment for the defendant on the ground that, according to Doe v. Bancks and Read v. Farr, the license was determinable only at the option of U., who had not signified such option. In Doe v. Bancks, and Read v. Farr, the lease was, by the terms of it, to be utterly void to all intents and purposes. But in Arnsby v. Woodward, 6 B. & C. 519, where, in addition to the words rendering the lease void, it was stated "that it should be lawful for the lessor to re-enter and expel the tenant," the court held that the addition of those words showed, that it was the intent of the parties that the lease should be

only voidable by re-entry; and consequently, that the landlord had, by a subsequent receipt of rent, waived the forfeiture; and in Doe v. Birch, 1 Mee & Welsby, 403, a clause that on the breach of certain stipulations "it should be lawful for the lessor to retake possession of the premises, and that the agreement should be null and void," was held to have the same effect, and to admit the question of waiver. See also Dakin v. Cope, 2 Russ. 170. This shows with what strictness the courts will read such a proviso in order to prevent an absolute forfeiture. Indeed in Arnsby v. Woodward, Lord Tenterden said, that supposing the proviso had been in the very same words as in Read v. Farr and Doe v. Bancks, he should have still thought that a receipt of rent by the landlord would be an admission, that the lease was subsisting at the time when that rent become due, and that he could not afterwards insist upon a forfeiture previously committed; and his Lordship said, that to hold the contrary would be productive of great injustice, for it would enable a landlord to eject a tenant, after he had given him reason to suppose that the forfeiture was waived, and after the latter had, on that supposition, expended his money in improving the premises. We must, therefore, look on this distinction between the possibility of waiving the breach of a condition which is to render the lease void, and that of one which is to render it voidable, as shaken; and indeed in Roberts v. Davy, 4 B. & Adol. 667, Sir W. Follett argued that it had been virtually overruled. Still there is no express decision to that effect, unless Roberts v. Davey be so considered; nor does it appear a necessary consequence, that because the tenant is prevented from taking advantage of his own wrong by insisting that the lease is absolutely void, it shall therefore be taken to be only voidable when that construction makes for the tenant and against the landlord; and when we consider the high authorities adducible in support of the distinction in question, and their analogy to the cases in which it has been determined that no acceptance of rent by a remainder-man will confirm a lease void as against him. Simson v. Butcher, Dougl. 51, *et notas*, Jenkins v. Church, Cowp. 483, we may conjecture that it will not be quietly allowed to become obsolete; and that further controversy may arise upon the question, whether the landlord, in case of a stipulation that the lease shall become void on breach of a condition which has been broken, is precluded by a subsequent receipt of rent from treating the lease as determined. On that question the words of Lord Coke are express, that "where the lease is *ipso facto* void by the condition, no acceptance of rent after can make it to have a continuance," 1 Inst. 214; and see also the other authorities above cited. On the other hand, the case of Roberts v. Davey is extremely strong. There, the person seeking to treat the license as void was not the licensee nor any one connected with him in interest; he was not taking advantage of any wrong done by himself; and so far from enabling the licensee to do so, he was actually insisting on the wrong committed by the licensee to the prejudice of the person representing that licensee; which differs the case from Read v. Farr, where the defendant, who sought to take advantage of the tenant's wrongful act, was connected with him in interest; so that, (unless there be a difference between the right of a landlord to consider the lease absolutely void before any expression of his election, and that of a third party to do so,) Roberts v. Davey is no doubt an authority that it is only voidable, in point of law, and with relation to all persons, including the landlord. And if the landlord as well as the tenant must treat it as voidable, no doubt the receipt of rent may operate as a waiver of the forfeiture. Perhaps the true rule may be ultimately held to be, that the effect of the proviso rendering the lease void is only to dispense with entry, and to substitute for it any expression of the lessor's election to avoid the lease.

On the question what is a sufficient entry where entry is requisite, see Doe v. Pritchard, 5 B. & Ad. 765; Doe v. Williams, ibid. 783."

768. DUNCAN v. LOWNDES, 3 Campb. 478.

Evidence ought to be given to show an authority for the signature of the partnership firm to a guarantee.

Overruled in Sandilands v. Marsh, 2 B. & Ald. 673; Gordon ex parte, 15 Ves. jun. 286.

769. DUNCAN v. SELF, 1 Murph. R. 466.

S. P. as in Tims v. Porter, (post).

770. DUNDAS v. DUTENS, 2 Cox Cas. in Ch. 235; 1 Ves. jun. 196, S. C.

Ld. Thurlow said, that a recital of a prior parol agreement, was valid, but that if it was not so, the plaintiffs had no equity against the fund which they sought.

Denied in Reade v. Livingston, 3 J. Ch. R. 490:—"We cannot say, from this report of the case, on which ground the bill was dismissed, nor does it even appear, whether the creditors were prior or subsequent to the settlement. A case so uncertain and so variously reported, can be of no material use or authority." See also 5 Cow. R. 72, 73.

771. DUNK v. HUNTER, 5 B. & Ald. 322.

Doubted in Warman v. Faithful, 3 Nev. & M. 137:—Littledale says—there have been conflicting decisions upon the subject as to what constitutes a lease;—"the old authorities are more clear."—Patteson, J:—"The rule is to look *for the intention* of the parties within the four corners of the instrument."

772. DUNKIN v. VANDENBURGH, 1 Paige's Ch. R. 622.

S. P. as in Gridley v. Garrison, (post).

773. DURAND v. CARRINGTON, 1 Root, 355.

The pendency of a suit improperly brought is no ground of abating a suit properly brought.

Overruled in Beach v. Norton, 8 Conn. R. 71—Williams, J.—'Finding then the parties in both suits the same, the object of both suits the same, and the effect of both suits to be the same;—connecting these facts with the presumption of law, that the party is apprised of his legal rights, the inference is, that the plaintiff is making an improper use of legal process. What is the consequence? The case cited of two informations on the same day, and for the same cause is analogous. There it was decided that the pendency of the other might be pleaded reciprocally, the one to the other; there being no precedency in the suit, for either, judgment should be given for neither. Hob. 128.

Com. Dig. tit. Abatement, Hen. 24. Or, as is said in Pye v. Cooke, Moore, 864, 5; the defendants shall answer neither. Vid. 3 Burr. 1434. The authority of the year books cited (by Parsons, C. J.) 5 Mass. R. 179, is very much in point. Where it would appear, that in a case like the one now before the court, all concurred, that where the plaintiff *proceeded in both*, both should abate. The precise point was decided by judge Hale. The city of London brought two actions against defendant, at the same time; in one they prescribed for two pence a hundred for *alienigenas*, and in the other, the prescription was laid for the payment of said duty, *tam per indigenes quam alienigenas;* and the defendant averred, that both were for the same duty, and so pleaded one in abatement of the other mutually, and so they were both abated. The Mayor and Commonalty of London v. B.—Freeman (B. R.) 401.

Here defendant avers, that plaintiff has two suits pending against him, for the same matter, cause and thing, commenced at the same time, by the same act, both proceeded in and brought to the same court; one of the suits being in his own name, the other in his own name also, but as *administrator* on the estate of his deceased wife.

The legal inference is, that the suits are vexatious, the court cannot be called upon to settle the account between them; but will leave the parties where they originally were."

774. DURAND v. CHILD, 1 Bulstr. 157.

Trespass will *not* lie by the owner of the soil, for an injury done to it in a highway.

Overruled in Lade v. Shepherd, 2 Stra. 1004; Peck v. Smith, 1 Conn. R. 103. 118.

775. DUTCHESS COT. M. v, DAVIS, 14 John. 245—Thompson.

"The defendant having undertaken to enter into a contract with the plaintiffs in their corporate name he thereby admits them to be duly constituted a body politic and corporate under such name."

Doubted, Neilson, J. in 8 Wend. 481: "The remark was not necessary to the point under consideration."

776. DUTCHESS OF KINGSTON'S CASE, 11 State Tr. 261; 20 How. St. Tr. 528; 2 B. & C. 887.

"The judgment of a court of *concurrent* jurisdiction, directly upon the point, is, as a plea in bar, or, as evidence, conclusive between the same parties, upon the same matter directly in question in another court," &c.

Denied in Jackson v. Wood, 3 Wend. 27; but this case was reversed in Wood v. Jackson, 8 Wend. 1. Vid. 3 Cowen, 120, and 4 ib. 559.

777. DUVALL v. CRAIG, 2 Wheat. 45.

That a variance between the writ and declaration cannot be taken advantage of on general demurrer, but must be pleaded in abatement.

Denied. 1 Saund. 318, note 3; Giles v. Perryman, 1 Maryland R. 171.—Earle, J.

778. DYER, 253. b. pl. 102.

Lease to W. C. *pro termino* 12 *annorum, si tam diu vixerit; et si obierit infra predictum terminum, tunc, &c.* The remainders were holden void, because the term is determinable on the life of W. C.

This doctrine is denied in Wright v. Cartwright, 1 Burr. 282, where it is settled that "*term*" means the *estate*, or *interest* created, as well as the limitation of time.

779. DYER v. EAST, 1 Vent. 146.

That a smiter in a church yard does not stand *ipso facto* excommunicated, until conviction at law, transmitted to the ordinary.

"This is the only case to be met with to this purpose; and it must be a mistake, either in the state of the case or in the opinion." Per Dennison, J. 1 Burr. 244.

780. EADES v. VANDEPUT, 5 East, 39.

Doubted by Ld. Ellenborough, (3 M. & S. 197, 8):—'it is but a very loose note;'—'under the uncertainty both of fact and form which attends that case, I think no very material argument is to be derived from it."

781. EARL OF BATH v. BATHERSEA, 5 Mod. 9.

Ld. Ch. J. Denman said (in Doe v. Derby, 1 Ad. & El. 783):—"That case is not stated clear enough to be relied upon."

782. EARL v. ROWCROFT, 8 East, 126.

That part of this case which contains the opinion that the motives of the shipmaster are of no account in a question of barratry is inconsistent with Crousillat v. Ball, 4 Dall. 296; Marcadier v. Chesapeake Ins. Co., 8 Cranch, 39. 49; Kendrick v. Delafield, 2 Caines, 72: and see note to 7 D. & E. 508 that barratry must arise *ex maleficio*.

783. EASLEY v. CROCKFORD, 10 Bing. 243.

S. P. as in Gill v. Cubitt, (post.) See Down v. Halling, (ante.)

784. EAST HAVEN v. HEMMINGWAY, 7 Conn. 186.

The owner of land adjoining a navigable river, has the exclusive right to the soil between high and low water mark; and may erect stores and wharves thereon.

Doubted. Chapman v. Kimball, 9 Conn. 38; Storer v. Freeman, 6 Mass. 438; Kean v. Stetson, 5 Pick. 492.

785. EASTON v. PRATCHETT, 1 C. M. & R. 4. Tyr. 472, was affirmed on error in Ex. Ch. 2 C. M. & R. 542.

786. EAST P. C. 528.

Denied in Commonwealth v. Snell, 3 Mass. 82; The People v. Howell, 4 John. R. 302; The People v. Dean, 6 Cowen, 31; and deciding that a party whose name has been forged may be a witness against the offender.

787. EAST'S CROWN LAW, 411, 440.

Mr. J. Buller decided at the Winchester Spring assizes, 1787—that the attempt to commit a rape was merged in the *actual rape*;—the lesser crime in the greater.

Overruled in State v. Shepard, 7 Conn. 54, and Commonwealth v. Cooper, 15 Mass. 187. Indictment for an attempt to commit, sustained by proof of a rape; or if indicted for a rape, he may be found guilty of an assault with intent to commit a rape.

788. EATON v. JAQUES, Doug. 460.

A mortgagee of leasehold lands is liable only in respect of the possession; and that as a mortgage is a mere security, the mortgagee out of possession was not liable as assignee.

Overruled in Williams v. Bosanquet, 1 B. & P. 72. 238 by ten judges: and Dallas, C. J. says that as the lessee is liable for the rent whether he enter or not, the assignee is under the same liability, although his assignment is only by way of security. But this latter decision not applicable in New York. See Williams v. Bosanquet.

789. EATON v. JAQUES, 2 Doug. 455.

That if a term be assigned by way of mortgage, with a clause of redemption, the lessor cannot sue the mortgagee as assignee of all the estate, right, &c. of the mortgagor, even after forfeiture of the mortgage, unless the mortgagee has taken actual possession.

Said to have been denied to be law. Powel on Mort. 241.

790. EATON v. SANFORD, 2 Day's R. 523.

Held, that a person who at the decease of W. was an infant, and while such married and so remained until she died, which was within five years from the commencement of the action, yet the case was within the saving of the statute.

Denied in Bush v. Bradley, 4 Day, 298; Bunce v. Wolcott, 2 Conn. 27.

791. EVANS v. THE COMMONWEALTH, 2 S. & R. 441.

Overruled in The Commonwealth v. Shepherd, 3 Penn. R. 509. 514.

792. EBERLE v. MAYER, 1 Rawle, 366.

Overruled in Howell v. Atkyn, 2 Rawle, 282. It is said (Amer. Jurist, No. 19. July 1833) to have been overruled itself by the Commonwealth v. Strembeck, 3 Rawle, 341. However, this is denied in No. 22 Jurist, Jan. and April, 1834.

793. ECCLESTON v. SPEAKE, 1 Show. 89.

Better reported in Carth. 80.

794. ECKHARDT v. WILSON, 8 D. & E. 140.

That the assignees of a bankrupt should be joined with his solvent partners.

Contra, 1 Esp. 140. 170; Webb v. Fox, 7 D. & E. 391; Fowler v. Down, 1 Bos. & Pul. 44; Bird v. Pierpont, 1 Johns. 126; 5 East, 230.

795. EDGAR v. BOIS, 11 S. & R. 415.

Doubted in Binny v. Gleason, 5 Wend. 396.

796. EDGAR'S LESSEE v. ROBINSON, 4 Dall. 132.

Doubted in Little v. Delancy, 5 Binn. R. 271, 273; Tilghman, C. J. and Yeates, J. "The report is short, and I am satisfied that the reporter was not present at the trial, or the case would have been stated with more clearness and precision."

797. EDGELL v. HAYWOOD, 3 Atk. 352.

S. P. as in Bayard v. Hoffman, (ante).

798. EDMUNDS v. HARRIS, 2 Ad. & El. 414; See 1 C. M. & R. 741; 2 ib. 547; 2 Bing. N. C. 671; 1 M. & W. 352.

Overruled in Broomfield v. Smith, 1 M. & W. 542: Held, that in *indebitatus assumpsit* or debt for goods sold and delivered, the defendant may prove, under the general issue, that the goods were sold on a credit which had not expired at the time of action brought.

799. 12 EDW. 4. PL. 12.

Overruled in Shaw v. Barbor, Cro. Eliz. 830: Held, that if tenant at will make a lease and the lessee enters, *he* only is the disseisor.

800. EDWARDS v. HARBEN, 2 T. R. 587.

Denied in Hall v. Tuttle, 8 Wend. 386; and later English cases have laid down, that, under almost any circumstances, the question,

fraud or no fraud, is one for the consideration of the jury. See Martindale v. Booth, 3 B. & Adol. 498, where several cases to this point are cited; and see in Carr v. Burdiss, 5 Tyrwh. 316, the expressions of Parke, B.; Dewey v. Bayntem, 6 East, 257; Reed v. Blades, 5 Taunt. 212. This is true in cases where the conveyance is *absolute* and there is no transmutation of possession; but where there is no change of possession by the express agreement of the parties, as, for instance, where it is by way of mortgage, and the mortgagee is not to take possession till a default in payment, the want of possession by the vendee is no evidence of fraud. Martindale v. Booth, 3 B. & Adol. 505; Reed v. Wilmot, 7 Bing. 577. See 2 K. C. 520. Ld. Tenterden says that "possession is to be much regarded; but that is with a view to ascertain the good or bad faith of the transaction." Latimer v. Batson, 4 B. & C. 634.

801. EGGLESTON v. LEWIN, 3 Salk. 175; 1 Salk. 23.

That *indebitatus assumpsit* will lie for money won at play.

Contradicted by Smith v. Bromley, Doug. 696, n; Howson v. Hancock, 8 D. & E. 535; Vandyck v. Hewit, 1 East, 98; Farrar v. Barton, 5 Mass. 395; Worcester v. Eaton, 11 Mass. 368.

802. EICHEBERGER v. M'CAULEY, 5 Har. & J. 213.

S. P. as in Clayton v. Andrews, (ante).

803. ELLIOTT v. DAVIS, Bunb. 23.

That plaintiff might recover beyond the penalty of a bond, by way of damages, being the interest due by the condition, or costs.

Doubted. Clark v. Birk, 3 Cow. 156. See 3 Bro. Ch. R. 490; 6 T. R. 303; 1 Taunt. 218.

804. ELLIS v. ATKINSON, 3 Bro. Ch. Ca. 563.

Overruled by Sir Pepper Arden, Master of the Rolls, in Socket v. Wray, 4 Bro. Ch. Ca. 483, but it may be doubted if it is not again established, and Socket v. Wray overruled by Heatley v. Thomas, 15 Ves. 596, and see Claney on the rights of married women, 88 to 100.

805. ELLIS v. ELLIS, 11 Mass. R. 92, (4 Burr. 2057.)

That the second marriage in the case of a prosecution for adultery must be proved by the oath of some person present when the marriage was solemnized.

Doubted by the Court in Cayford's case, 7 Greenl. R. 58.—Mellen Vid. Jos. Trueman's case, (post.)

806. ELLIS v. PAIGE, 1 Pick. 48.

Oppo. Jackson v. Laughead, 2 J. R. 75.

807. ELLIS v. RUDDLE, 2 Lev. 151; ELLIS v. AUDLE, 3 Keb. 552. S. C.; ELLIS v. NULSO, 3 Keb. 659. 678. S. C.

This case is examined and denied by Willes, C. J. in Huggins v. Bainbridge, Willes, 245.

808. ELMORE v. STONE, 1 Taunt. 458.

Doubted by Weston, J. in 4 Greenl. 381, saying—"In Horn v. Palmer, (3 B. & Ald. 321) Bailey, J. expresses a doubt of the authority of the decision in Elmore v. Stone."

809. ELMS v. CHEVIS, 2 M'Cord, 349.

That a book account may be proved by proving the hand-writing of the clerk who made the entry, if he be out of the state.

Denied in Merrill v. The Ithaca & Oswego R. R. Co., 16 Wend. 16—Cowen.

810. ELMSLEY v. YOUNG, 2 My. & Keene, 82. (7 Cond. R. 270.)

S. P. as in Hinckley v. M'Larens, and Phillips v. Garth, (post).

Reversed in S. C. 2 M. & Keene, 780. (8 Cond. R. 227;) See 4 K. C. 537, n.

811. ELWES v. MAWE, 3 East, 38.

Held, that buildings subservient to the purposes of agriculture did not come within the recognised exceptions of erections set up for the advantage of carrying on a trade.

Oppo. Dean v. Allaley, 2 Esp. R. p. 11; Amos & Fer. on Fix. 46 to 60; Gibbon's L. Fix. p. 27.

812. EMERSON v. HEELIS, 2 Taunt. 38.

Where growing turnips were sold, but no particular time was stated for their removal, nor did it appear what the degree of their maturity was, the court, without adverting to these circumstances, held it to be a sale of an interest in land within the statute.

Overruled in Evans v. Roberts, 5 B. & C. 829: Held, that a *sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of any interest within the fourth section*, (1 Sug. on V. p. 84.)

813. EMERSON v. HOWLAND, 1 Mason, 45, and Abbott on Shipping, p. 146.

Judge Story says, "In future, where seamen are discharged in a foreign port, I shall decree against the owners the whole of the three months wages, authorized and required to be paid by the st. 28th Feb. 1803," &c.

Doubted in Pool v. Welsh, 1 Gilpin R. 193, 200 to 203. Hop-

kinson, J.: "I cannot but hesitate to oppose myself, without a more deliberate examination of the question, to this learned and enlightened judge, and therefore have reluctantly determined to sustain this suit; but, at the same time, I shall not hold myself to be bound by this decree, if at any future time, on a more full argument, or by my own mature deliberation, I shall find my own impressions of the law to become deeper and stronger.

814. EMERSON v. THOMPSON, 16 Mass. 429.

Denied in Peck v. Bostford, 7 Conn. 180. Daggett, J.—"Emerson v. Thompson, 16 Mass. 429, and that rests on Baxter v. Penniman, 8 Mass. 134; which, as has been shown did not affect the point in controversy."

815. EMERY v. GROCOCK, Mad. 57.

Limited and qualified in Magennis v. Fallon, 2 Moll. 579.

816. ENGLISH v. HARVEY, 2 Rawle R. 309.

S. P. as in M'Call's Estate, (post.)

817. EPPES v. RANDOLPH, 2 Call, 125, and Tinsley v. Anderson, 3 Call, 329.

Limited by C. J. Marshall (1 Brock. R. 171):—"Those cases in my opinion go a great way. I shall respect them in a case precisely similar, but shall not extend their application.—They were pronounced in favor of sureties who had discharged judgments against their principals and themselves, and I shall not consider them as extending to cases of a different description.

818. EPPES v. TUCKER, 4 Call's R. 346.

S. P. as in Bradhurst v. The Columbian Ins. Co. (ante.)

819. EQUITY CAS. ABR. (Vol. 2.)

'In 1756 a supplemental part or volume was published, continuing the cases to the present time. This is not so highly esteemed as the *first*, for Kenyon said (2 Bro. Ch. C. 45,) that this book was not of the first authority, yet he must be guided by such cases as stand in point there, particularly where they contain much sense and reason.' Bridg. L. B. 112.

Lord Eldon (1 Bligh. 539) said:—"The case happens to be reported likewise in another book of no very high character. I mean the second volume of the Equity Cases abridged. It is not so high in character as the first volume of the Equity Cases abridged."

820. ERSKINE v. TOWNSEND, 2 Mass. 496.

What is said by Parsons, C. J. that if the mortgagee declare generally, and the mortgagor shall plead in bar that the mortgagee is seized as tenant in mortgage, the condition of which is broken, the action shall be barred;—is overruled in Green v. Kemp, 13 Mass. 515.

821. ESTWICK v. CAILLAUD, 5 T. R. 420.

Doubted in Mackie v. Cairns, 5 Cow. 568; by Colden, Senator and p. 582.—Savage, C. J.

822. EVANS et al. v. BEATTIE, 5 Esp. Cas. 26.

In a suit against the guarantee of one C, for "any woolens that should be furnished him by plaintiff," evidence was offered to prove C's. parol acknowledgment of certain goods delivered, but refused on the ground that he might be sworn.

Doubted in Drummond v. Prestman, 12 Wheat. R. 522—Johnson, J.

823. EVANS v. BICKNELL, 6 Ves. 183—did not go quite as far as C. B. Richards states it in Hall v. Maltby, 6 Price, 258, with respect to the rule of evidence. The report in Vesey is silent on that point of the case. Mulholland v. Hendrick, 1 Moll. Ch. R. 360.

824. EVANS v. CHARLES, 1 Anst. 128.

Doubted in Price v. Strange, 6 Madd. 159; but in Palin v. Hills, 1 M. & K. 470. (7 Cond. 132) its authority recognised.

825. EVANS v. CRAMLINGTON, Carth. 5.

Doubted. See Sigourney v. Lloyd, 8 B. & C. 622.

826. EVELYN v. EVELYN, 2 Dick. 800.

"Evelyn v. Evelyn is but a word, and does not explain the nature of the estate." Per V. Ch. in 2 Sim. & Stu. 144.

827. EVELYN v. TEMPLAR, 2 Bro. Ch. C. 148.

The printed note is very imperfect. Per Ld. Eldon in Pulvertoft v. Pulvertoft, 18 Ves. 84.

828. EVERETT v. GRAY, 1 Mass. R. 101.

The gunlocks which were the subject of the contract, had been received, and afterwards proved defective; and it was thought that the defendant could not be permitted to show the defect, although arising from fraud in the plaintiff, against the claim for the consideration according to his contract.

Doubted in Taft v. The Inhab. of Montague, 14 Mass. 282.

829. EX PARTE ALEXANDER, 2 Glyn & J. 275.

An equitable mortgagee is not entitled to the rents and profits of the mortgaged estate previous to the sale.

Ex parte Rignold, 2 Glyn & J. 273.

830. EX PARTE CROWDER, 2 Vern. 706. Ex parte Cook, 2 P. Wms. 500; Ex parte Hunter, 1 Atk. 228; Ex parte Taitt, 16 Ves. 195.

Lds. King and Hardwicke, from 1715 to the time of Ld. Thurlow, held, that joint creditors could not prove under a separate commission, for the purpose of receiving dividends with the separate creditors; but only for the purpose of going for the surplus after the satisfaction of the separate creditors.

Overruled in Ex parte Hodgson, 2 Bro. Ch. R. 5. Ld. Thurlow (in 1785;) held, that there was no distinction between joint and separate creditors; that they ought to be paid out of the bankrupt's estate, and his moiety of the joint estate; and that the joint creditors ought to come in *pari passu*, with the separate creditors. See Ex parte Hodson.

831. EX PARTE DEEZE, 1 Atk. 228.

A packer claimed to retain goods, not only for the price of packing them, but for a sum of 500*l.* lent to the bankrupt on his note; and d. Hardwicke determined that he had such right, on the ground of mutual credits.

Overruled in Ex parte Ockenden, 1 Atk. 235; and Rose v. Hart, 8 Taunt. 499: held, that cloths delivered a fuller, to be dressed, could not be detained for a general balance for work done for a bankrupt before his bankruptcy. Sed see 3 M. & S. 167.

832. EX PARTE DICKSON, 1 Rose, 98.

Upon the decision in Ex parte Dickson, Lord Eldon afterwards entertained doubts, and the rule at law and in equity is now the same. Ex parte Conroy, 1 Molloy's Ch. R. 2.

833. EX PARTE DRAKE, 1 Mont. & Bligh. 486; 2 Dea. & Chit. 91.

Oppo. Ex parte Nichols, 2 Glyn & J. 101.

834. EX PARTE DUMAS, 1 Atk. 232.

If a factor who has goods consigned to him, receive notes instead of money, the principal is entitled to the notes, and not the creditors at large in case of insolvency. Limited and defined in West Boylston M. Co. v. Searle, 15 Pick. 225. Shaw, C. J. (p. 230.) Also Dwight v. Whitney, ib. 179; 3 Mason, 282.

835. EX PARTE GARDON, 15 Ves. 286.

Partnership bound by the signature of one partner, although a guaranty for another.

Doubted by Chan. Kent, (2 K. C. 46, 47.) But Mr. Collyer, (p. 230.) states the fact, that the guaranty was with reference to a partnership transaction; and therefore consistent with Ex parte Nolte, 2 Glyn & Jam. 306.

836. EX PARTE GUTHRIE, 1 Moll. Ch. R. 245.

Lord Chan.—Lord Eldon in Ex parte Guthrie, directed the commission to be re-sealed from the old date, *nunc pro tunc*, giving validity to all acts done under it. But no *nunc pro tunc* order can make that regular which in its inception is invalid. Ex parte Sneyds, 1 Moll. Ch. R. 269.

837. EX PARTE HALE, 3 Ves. 304.

The bankrupt was the acceptor of a bill, the petitioner, i. e. claiming to make it an item of set-off, had indorsed; it was in the hands of the indorsee at the time of the bankruptcy; and the petitioner had been obliged to take it up after the bankruptcy. Ld. Loughborough held "that the petitioner might prove, but that he could not set off."

Overruled in Collins v. Jones, 10 B. & C. 760; Bolland v. Nash, 8 ib. 105.

838. EX PARTE HODGSON, 2 Bro. Ch. R. 5.

The rule of Ld. King, "that the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors; and if there be, on the other hand, a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors," (see Ex parte Crowder, &c. ante): was deviated from by Ld. Thurlow.

Overruled in Ex parte Elton, 3 Ves. 240. Ld. Loughborough; and followed by Ld. Eldon, in Ex parte Clay, 6 Ves. 833. See Dutton v. Morrison, 17 Ves. 206; see Collyer on Part. p. 527, *et seq.* as to the exceptions to the rule; and 3 Paige's Ch. R. 168; and 1 Maryland R. 96, 101.

839. EX PARTE MANNING, 2 P. Wms. 410.

Doubted in Dorsey v. Smith, 7 Har. & J. 364, 5; Archer, J.:—"The case of Ex parte Manning came in review before Lord Hardwicke, in Blount v. Blount, 3 Atk. 635, who remarked that he never knew 'the court take into consideration, as a reason for the purchaser paying in-

terest, the wearing out of lives.' This doctrine of Ld. Hardwicke is sanctioned in the case of Growsock v. Smith, 3 Anstr. 877." But Mr. Sugden, (2 Sug. on V. 4, 8,) seems to adopt the case of Ex parte Manning.

840. EX PARTE MARSHALL, 1 Atk. 262.

Doubted in Wynn v. Brooke et al., 5 Rawle's R. 109—" seems not to be fully or acourately reported."

841. EX PARTE NICHOLAS, 6 Taunt. 408 ; 2 Marsh. 123. S. C.

That the admission of an attorney, who has omitted to take out his certificate for one whole year after his admission, is absolutely void.

Oppo. Ex parte Jones, 2 Dowl. Pr. R. 251 ; Hilleary v. Hungate, 3 ib. 56,—Parke and Littledale, Js.

842. EX PARTE SUTTON, 2 Cox's Cases, 84.

The authority of an agent may be delegated so as to enable another to act for his principal.

Oppo. Palliser v. Ord, Bunbury, 166 ; Coles v. Trecothick, 9 Ves. 234.

843. EX PARTE TURNER, 3 Ves. 243.

Doubted in Paley v. Field, 12 Ves. 437; and it is qualified in Ex parte Libbon, 17 Ves. 334 ; 1 Rose, 219 ; see Ex parte Rushforth, 10 Ves. 411.

844. EYLES v. CARY, 1 Vern. 457.

Marginal note, 1 Equ. Cas. Abr. 198;—" This is a strong case, I question if it would be now so decreed. Per Verney M. R., in the case of Mallison & Middleton, Aug. 2, 1739." Ram. on Assets, &c. p. 64. n. (m).

845. EYRES v. BOND, 4 Burr. 2118.

Doubted it seems by Ch. J. Marshall, (1 Brock. R. 250 :) " reported in a very unsatisfactory manner." " There is too much uncertainty in the report to rely much upon it."

846. FAIKNEY v. REYNOUS & al. 4. Burr. 2069.

Bond for repayment of money lent for a purpose prohibited by act of parliament ; and held good—but a distinction taken between *malum prohibitum* and *malum in se*, as applicable to such bonds.

Lawrence J. said this distinction had been very often doubted. Webb v. Brooke, 3 Taunt. 10. It is questioned also by Ld. Ch. J. Eyre in Mitchell v. Cockburne, 3 H. Bl. 379. by Ld. Eldon, in Aubert v. Maize, 2 Bos. & Pul. 372; and by Ld. Loughborough in Ex parte Mather, 3

Ves. 373. See also, Steers v. Lashley, 6 D. & E. 61 ; Clayton v. Dilly, 4 Taunt. 165 ; Lacaussade v. White, 7 D. & E. 535; Howson v. Hancock, 8 D. & E. 575 ; Vandyck & al. v. Hewit, 1 East, 98 ; Worcester v. Eaton, 11 Mass. 368 ; Farrar v. Barton, 5. Mass. 395 ; Aubert v. Walsh, 3 Taunt. 277.

847. FAIRLIE v. CHRISTIE, 1 Holt's N. P. 331.

Verdict set aside and plaintiff nonsuit. See S. C., 7 Taunt. 415.

848. FAIRMAN v. IVES, 1 B. & Ald. 642.

That the words were spoken in an innocent sense, or on an occasion which would justify the publication, may be given in evidence under the general issue.

Doubted in Stockley v. Clement, 4 Bing. 167, Best, C. J. in delivering the judgment of the court, intimated, that where a libel contained facts which would make it a privileged communication, the facts ought to be specially pleaded.

849. FALMOUTH (LORD) v. GEORGE, 5 Bing. 286.

Where the question was as to the right to exact toll on boats frequenting a cove in virtue of a custom for keeping up a capstan and rope to assist boats in landing in bad weather : Held, that a fisherman frequenting the cove was not a competent witness for a party resisting the toll.

Overruled in Lancum v. Lovell, 9 Bing. 465 :—Held, in an action for a toll claimed on a public road, persons who have refused to pay the toll are, from necessity, competent to give evidence, notwithstanding their interest in the result of the cause.—Park, J. in delivering the judgment of the court saying :—" Whether it would be possible to support the case of Lord Falmouth v. George, by supposing it savored more of a private than of a public right, I do not think it worth while to discuss. Because in this case (Lancum v. Lovell), there can be no doubt that this was a matter in which every subject of the king has an interest ; and if any one man, because he has passed that way, unmolested or resisting, and therefore having an interest, is rejected, every individual in the kingdom is equally objectionable."—It is a public right in which all mankind are interested ; and such witnesses of necessity must be admissible.

850. FAIRBROTHER v. SIMMONS, 5 B. & Ald. 333.

Doubted in Bird v. Boultier, 4 B. & Adol. 443, where Taunton, J. says " I very much agree with my brother Littledale as to the difficulty in Farebrother v. Simmons, but there is no necessity to overrule that case."

851. FARMER v. ARUNDEL, 2 Black. R. 825.

Denied in Clarke v. Dutcher, 9 Cowen, 686—Sutherland, J. speaking of Ch. J. Mansfield's solicitude (in 5 Taunt. 144) to avoid collision with the *dicta* of Ch. J. De Grey and Ld. Mansfield, said—"I think his lordship might better have denied those *dicta* to be law, as Ld. Ellenborough did in Bilbie v. Lumlie, (2 East, 469), than to have sought to evade them by his gloss."

852. FARMER, SIR GEO. v. BROOKE, Owen, 67; 1 Leon. 142; Cro. Eliz. 203; 8 Co. 125. b. S. C.

The reporters differ as to the judgment in this case.

853. FARMERS' AND MECH. BANK v. SMITH, 3 S. & R. 63.

Reversed in S. C. 6 Wheat. R. 131.

854. FARR v. CRISP, 2 Barnard. 521.

Denied in 2 Phill. Ev. 436, n. (1). (7 Lon. ed.:) "It is conceived that there must be an error in the report."

855. FARRAR v. STACKPOLE, 6 Greenl. R. 150.

The purchaser of a factory, will hold the machinery under the name of the factory.

Oppo. Swift v. Thompson, 9 Conn. R. 63. Sed see 2 K. C. 345, n. (c).

856. FARR v. NEWMAN, 4 D. & E. 621.

That in an action against an executor for his own debt, the goods of the testator cannot be taken in execution.

The contrary is the law of Massachusetts. Vid. Coburn v. Ansart, 3 Mass. 319; Vid. also Scott v. Tyler, 2 Dick. 274; Hill v. Simpson, 7 Ves. jr. 152; Taylor v. Hawkins, 8 Ves. jr. 209; Quick v. Staines, 1 Bos. & Pul. 293.

857. FARRINGTON v. LEE, 1 Mod. 269, and 2 Mod. 312.

Denied in Union Bank v. Knapp, 3 Pick. 96, 112:—It was contended, that where accounts are settled by carrying the balances forward instead of paying the same in cash, they are to be considered as open and running accounts from the beginning, and so not within the statute of limitations:—Putnam, J. said:—"We do not think this inference is to be drawn from the case of Farrington v. Lee, cited for the plaintiff, but if it is, we should consider that this point was as erroneous as was another in the same case, namely, that the saving clause in the statute as to merchants' accounts extends only to actions of account. It is now settled that the exception is to be to actions of *assumpsit*, as well as to actions of account. Mandeville v. Wilson, 5 Cranch 18. But see Union Bank v. Knapp, (post).

858. FARWELL v. HEELIS, Ambler, 724; 2 Dick. 485. S. C.

Questioned in Blackburn v. Gregson, 1 Bro. Ch. Ca. 420, and overruled in Mackreath v. Symmons, 15 Ves. 329.

859. FAWKES v. GRAY, 18 Ves. 131—follows Griffiths v. Smith, but in a way that adds nothing to its authority. Colhoun v. Thompson, 2 Moll. Ch. R. 287.

860. *FEATHER'S APPEAL*, 1 Penn. R. 322.

Overruled in Shoenberger v. Adams, 4 Watts, 430 as to the intimation 'that the statute runs not to protect a debtor after being discharged under the insolvent laws.'

861. FENDALL v. NASH, 5 Ves. 197, note.

Denied in Turner v. Turner, 4 Sim. 430. The V. Chan. says, "As to the case before Ld. Thurlow, (Fendall v. Nash, 5 Ves. 197 note) I cannot bring myself to think that case properly decided." See Errat v. Barlow, 14 Ves. 202.

862. FEIZE v. AGUILLAR, 3 Taunt. 507.

Under a valued policy, the amount of interest need not be proved. The value insured must be taken as the value of the assured's interest.

Qualified in Wolcott v. Eagle Ins. Co., 4 Pick. 429. But see Lovering v. Mer. M. Ins. Co., 12 ib. 367.

863. FENNER v. MEARS, 2 W. Bl. 1269.

The assignee of a *respondentia* bond may maintain *assumpsit* against the obligor, who has engaged by an endorsement on the bond to pay the same to any assignee.

Doubted in Johnson v. Collings, 1 East, 104—Kenyon: "I cannot as at present advised and upon the general view of it agree with the case of Fenner v. Mears, in Bl. Rep. The result of it however seems to be this, that the determination having been made according to equity and good conscience, the court will not disturb the verdict; and I doubt whether the decision can be sustained on any other ground." See White v. Parkins, 12 East, 582; 5 Wend. 203; 10 S. & R. 321.

864. FENTON v. GOUNDRY, 13 East, 459.

Though a bill be accepted payable at a particular place, it need not be presented at the place mentioned.

Overruled in Callaghan v. Aylett, 3 Taunt. 397, and Gammon v. Schmoll, 5 Taunt. 344; Bowes v. Howe, 5 Taunt. 30; Rowe v. Young, 2 Bro. & B. 165; but altered by st. 1 and 2 Geo. 4. c. 77.

865. FENTON v. WARRE, 2 Tyrw. R. 158.

Overruled in ibid, p. 592, S. C.

866. FERGUS v. GORE, Sch. & Lef. 107.

Limited in Congreve v. Power, 1 Moll. 121.

867. FIELD v. HOLLAND, 6 Cranch, 24.

That the answer of a defendant may be evidence against a co-defendant, who derived his right from him.

Oppo. Ward v. Davidson, 2 J. J. Marsh, 443, 445; Rees v. Lawless, 4 Litt. R. 218. The decisions in Kentucky proceed upon the distinction that the answer filed before the respondent has parted with his interest shall be received against all to whom the subject afterwards comes; but not if filed after. See 1 Phil. Ev. 361, note 648, 650.

868. FILLY v. BRACE, 1 Root, 507.

That mere liability, without any damage, is sufficient cause of action.

Overruled in Booth v. Starr, 1 Conn. R. 244.

869. FISH v. WEATHERWAX, 2 J. Cas. 215; Horne v. Barney, 19 John. R. 247.

Denied in Favor v. Philbreck, 5 N. H. R. 359; "We are aware that it has been decided in New York, that a writ of error will not lie where judgment has been arrested:—and the reason assigned, is, that there is no judgment to be affirmed or reversed. But this is a mistake." (2 Mass. 142.)

870. FINCH v. WILSON, 1 Wils. 167.

Doubted. 2 Saund. 63. note. Ballantine on Stat. Limitations, 233.

871. FITCH v. SUTTON, 5 East, 230.

The doctrine settled in this case, is, that a similar security for a smaller debt cannot be pleaded in satisfaction of a larger one.

Oppo. Alner v. George, 1 Camp. 392; but Smith (in Lead. Cas. 147. n.) observes:—"Yet it is clear, both upon general principle, and from the decisions in Fitch v. Sutton, and other cases, that such an instrument, not being an estoppel, cannot prevent the plaintiff from insisting that part of his demand remains unsatisfied. See Graves v. Key, 3 B. & Ad. 313; Skaife v. Jackson, 3 B. & C. 421; Stratton v. Rastall, 2 T. R. 366.

It must be observed, that later cases have engrafted on the doctrine, that a smaller sum can be no satisfaction for a larger one payable in the same manner; this distinction, that, although, where there is a liquidated debt, the rule laid down in Cumber v. Wane prevails, yet, if there be not a liquidated debt, but an unliquidated demand of pecuniary damages, in that case the acceptance of a smaller sum than the plaintiff may have originally claimed, will be a satisfaction of his whole demand,

and a good answer to an action in respect of it. This distinction seems to have originated in the case of Longridge v. Dorville, 5 B. & A. 117; it was discussed in Watters v. Smith, 2 B. & Adol. 889, and settled by Wilkinson v. Byers, 1 Adol. & Ell. 106. That was an action of *assumpsit*; the declaration stated that T. R., as the defendant's attorney, had sued the plaintiff in the Palace Court for 13*l.* 10*s.* which action was depending; and thereupon, in consideration that the plaintiff would pay the defendant the 13*l.* 10*s.*, the defendant promised the plaintiff to settle with the said attorney for the costs of the action, and indemnify the plaintiff against them; that plaintiff accordingly paid the 13*l.* 10*s.*; but that defendant neglected to settle with the attorney, who proceeded with the action, and signed judgment against the plaintiff, who was obliged to pay 7*l.* 10*s.* costs, and 3*l.* in endeavoring to set aside the judgment. At the trial, it appeared that Byers, the present defendant, was a wood-turner, who had done work for Wilkinson, the present plaintiff, to recover a compensation for which the action had been brought. A verdict was found for the plaintiff, subject to the opinion of the court, upon the question, whether, as the payment of the 13*l.* 10*s.* was a payment in discharge of an admitted debt, it could be any consideration for the defendant's promise to indemnify the plaintiff against the costs of the Palace Court action. The court held that the verdict was right. "The case," said Parke, J., "may be decided shortly on this ground. If an action be brought on a *quantum meruit*, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs, and proceed no further. Payment of a less sum than the demand has been held to be no satisfaction in the case of a liquidated debt, but where the debt is unliquidated, it is sufficient. Now, here we cannot say that there was originally any certain demand. A jury, if asked, could not, in my opinion, have said so. In the great majority of actions of this nature, for work, labor, and goods sold, it is not a specific sum that forms the subject matter of the action; and, unless that could have been shown in the present case, there was a good consideration for the promise."

872. FITZER v. FITZER, 2 Atk. 511.

Where an agreement for a separate maintenance rests in articles between the husband and wife; held, that such articles may be enforced at the suit of the wife.

Doubted in Wallingsford v. Wallingsford, 6 Har. & J. 489—Martin, J.:—"But it is said, this decision was disapproved by subsequent chancellors; and Legard v. Johnson, 3 Ves. 361; St. John v. St. John, 11 Ves. 532, and Wilks v. Wilks, 2 Dick. 791, are referred to as evidence of it."

873. FITZGIBBON'S REPORTS.

Ld. Hardwicke called this "a book of no authority." 3 Atk. 610, but allowed the case of Holt v. Ward to be well reported. See also Andrews, 75.

874. FITZROY v. GWILLIM, 1 T. R. 153.

Overruled in Tregoning v. Attenborough, 4 Moore & Payne, 722; 7 Bing. 97, S. C:—Tindal, C. J. said:—"The case of Fitzroy v. Gwillim has been cited, as having held that a party cannot entitle himself to relief from an usurious contract by a civil remedy, (as by maintaining an action of trover,) unless he tender all the money really advanced. It seems to me that that case can hardly be supported, according to the concurrent testimony of Westminster Hall, it was hastily decided." Gazelee, J. said—"The case of Fitzroy v. Gwillim has always struck me as being a very extraordinary decision." See also Ramsdell v. Morgan, 16 Wend. R. 574, 575; 4 B. & Adol. 92, and 2 Ad. & El. 12.

875. FLAGG v. MANN, 14 Pick. R. 467.

Doubted in Flagg v. Mann et al., 2 Sumn. R. 486, 544, in respect to the views suggested in the opinion delivered in behalf of the court.

876. FLECKNER v. U. S. BANK, 8 Wheat. 338.

That the use of the seal grew out of the state of the times in which it originated, and the authentication of an instrument by the use of the common seal, (of a corporation) was attended with fewer difficulties and perplexities, &c.

Denied in Union Bank of Maryland v. Ridgely, 1 Har. & G. 423; Buchanan, Ch. J.:—"That would seem to be a mistake; the greater facility and certainty, attending the authentication of an instrument by the use of the common seal, was not the reason why it was originally held, that corporations could act in no other way."

877. FLETCHER v. SONDES, 5 B. & A. 835.

Overruled in S. C. (in error,) 1 Bligh. N. S. 144; 3 Bing. 598.

878. FLETCHER v. PECK, 6 Cranch, 125.

Doubted. Mr. Ch. J. Taney, (in Charles R. Bridge v. Warren Bridge, 11 Pet. 573,) says—"If it had not been otherwise laid down in the case of Fletcher v. Peck, 6 Cranch, 125, I should have doubted, whether the inhibition (which prohibits states from impairing the obligation of contracts) did not apply exclusively to executory contracts. This doubt would have arisen as well from the consideration of the mischief against which this provision was intended to guard, as from the language of the provision itself."

879. FLOWER'S CASE, Noy's R. 67.

S. P. as in Irons v. Smallpeace, (post).

880. FLOYD v. BROWN, 1 Rawle's R. 121.

S. P. as in Smith v. Gibson, (post).

881. FOOT v. TRACY, 1 Johns. 46.

Case for a libel, and not guilty pleaded. On the Deft's. motion to give in evidence the general character of the Plf. in mitigation of damages, the Court were equally divided, and Deft. took nothing by his motion.

But such evidence is admissible in Massachusetts. Larned v. Buffinton, 3 Mass. 546. Vid. also King v. Waring, 5 Esp. 14.

882. FORBES v. FANSHAW, Trin. 24. G. 3. C. B.

Denied in Latless v. Holmes, 4 D. & E. 660.

883. FORD v. GREY, Salk. 286.

If one makes an answer in Chancery which is prejudicial to his estate, it may be given in evidence against him, but not against his alienee.

Doubted. Gres. Eq. Ev. 323, 4; See 1 Phill. Ev. p. 361, note 648.

884. FORD v. JONES, 3 B. & Ad. 248.—Littledale, J.

"Such assent must always be a matter of doubt."

Explained in the matter of Tunno, 5 B. & Ad. 488.—"I can hardly think, if it had distinctly appeared that the parties agreed to the mode of choice, the Court would have decided as it did."—Patteson. "If that means that the appointment (by lot of arbitrators) would be bad although the parties assented, I cannot agree in the proposition; but I think what was said there proceeded on the want of any sufficient proof of assent or acquiescence."—Parke.

885. FORMAN v. HOMFRAY, 2 V. & B. 329; Lascombe v. Russel, 4 Simon, 10.

Lord Eldon seems to have thought, and the Vice Chancellor has decided that one partner cannot file a bill against another, praying for an account, without a dissolution of the partnership.

Doubted in Harrison v. Armitage, 4 Madd. 143, where Sir John Leach, expressed a contrary opinion.

886. FORRESTER v. COTTEN, Ambler, 388.

Overruled. In Stump v. Findlay, 2 Rawle, 174—Ch. J. Gibson:—"And, beside, I take the principle in Forrester v. Cotten to have been since overruled."

887. FORTH v. CHAPMAN, 1 P. Wms. 667.

Doubted by Thompson, J., in 1 John. R. 451. "The Lord Chancellor thought the words *leaving no issue*, ought to receive a different construction when applied to real, than when to personal estate." The soundness of this distinction has been much questioned. "Denied also in Drummet v. Barber, 2 Hill's R. 551; 4 K. C. 275.

888. FORTUNE, MANUCAPTORS OF DAVIS, Carth. 8, recognised by Buller, J. in Chandler v. Roberts, 1 Dougl. 58.

In *sci. fa.* against special bail the plaintiff in his replication should set out the *ca. sa.* and return.

Doubted, in Cappeau v. Middleton, 1 Maryland R. 154.

889. FOSTER v. ALLANSON, 2 T. R. 170.

A previous partnership being dissolved, and an account settled, is in point of law, a sufficient consideration for a *promise*.

Doubted. Parke, J. in 2 Bingham's N. C. 108, said:—"That decision was considered at the time a great novelty in principle." But it was confirmed in Fromount v. Coupland, 2 Bing. 170; 9 Moore, 319, S. C. where it was held there *must* be an *express* promise to pay. But Collyer, p. 152, 3, and note (45); Rackstraw v. Imber, (post).

890. FOSTER v. BLAKELOCK, 5 B. & C. 328.

That a probate stamp was sufficient proof of assets.

Denied in Stearns v. Mills, 4 B. & Ad. 655, by Littledale, J.—"The point in that case regarding the effect of a probate stamp, as *prima facie* evidence of assets, does not seem to have been much considered. And Parke, J. said—"I cannot concur in that decision."

891. FOSTER v. JACKSON, Hob. 52.

"That a *capias ad satisfaciendum*, as against the party, is not only an execution, but a full satisfaction by force and act and judgment of law."

Qualified and limited in Sunderland v. Loder, 5 Wend. 58.

892. FOSTER v. SHAW, 7 Serg. & R. 156.

Oppo. to the cases of M'Dill's Lessee v. M'Dill, 1 Dall. 63, and Hamilton's lessee v. Galloway, ib. 93, and "overturning a construction thereby given to our recording acts, which I think has been almost universally followed ever since, without objection." Kennedy, J. in Chew v. Keck et al., 4 Rawle's R. 163, 165, *et seq.*

893. FROTHERINGHAM v. GREENWOOD, 1 Stra. 129.

Pratt, Ch. J. said, "that if a witness thinks himself interested, it is a bias upon him;" and it had before been ruled by Ch. J. Parker, that a

person under an honorary obligation to indemnify the party producing him, was not a competent witness.

Overruled in Bent v. Baker, 3 T. R. 365; Smyth v. Downs, 6 Conn. R. 365; Phelps v. Winchel, 1 Day, 269.

894. FOWKES v. GRAY, 18 Ves. jun. 131.

S. P. as in Griffiths v. Smith, (post).

895. FOWLER v. ÆTNA FIRE INS. CO., 6 Cow. 673.

Ch. J. Savage said, that he saw no reason for a difference in a fire policy from a marine policy in respect to the description of the property insured.

Oppo. Jolly v. Baltimore Eq. Soc., &c., 1 Maryland, 295.

896. FOWLER v. PADGET, 7 D. & E. 509.

That merely departing the realm, without actual *intent* to delay creditors, is not an act of bankruptcy.

Overruled in Robertson v. Liddel, 9 East, 437.

897. FOWLER v. SHEARER, 7 Mass. R. 19.

That the covenants in a deed were of themselves a sufficient consideration for a promise, although there is a want of title.

Denied in Rice v. Goddard, 14 Pick. 296. A total failure of title is a total failure of the consideration.

898. FOX v. CHESTER (Bishop), 4 D. & R. 93; 2 B. & C. 635.

Overruled in S. C. (in error) 1 Dow. & C. 416; 3 Bligh, N. S. 123; 6 Bing. 1.

899. FOX v. COLLYER, And. 65. pl. 140; Mo. 107. pl. 251.

In favor of concurrent leases.

Doubted. See the observations of Mr. Sugden, in Sug. on Pow. p. 216 *et seq.* (Am. ed.)

900. FOXCRAFT v. LACY, Hob. 89.

Doubted in Sumner v. Buel, 12 John. R. 479.—Thompson, Ch. J.: "But the correctness of the report of Foxcraft v. Lacy may be questioned." In Symm's case, (Godb. 391,) it is said, that it was adjudged that the action would not lie. (See also, 1 Viner, 510, note.)

901. FRAMPTON v. PAYNE, 1 H. Bl. 65.

Where issue was joined in one term, and there was time to give notice of trial in the same term, the plaintiff was bound to do so, or the defendant might have judgment as in case of a nonsuit.

Overruled *it seems* in Baker v. Newman, ib. 123; Da Costa v. Ledstone, 2 ib. 558; Prentice v. Blott, 2 Bing. 360; 9 B. Moore, 687, S. C.;

Munt v. Tremanando, 4 T. R. 557. See also Mosely v. Clarke, 2 Dowl. Pr. R. 66.

902. FRANCIS v. WYATT, 3 Burr. R. 1498.

Doubted in Brown v. Shevill, 4 Nev. & M. 277:—Held, that all goods sent to a tradesman to be wrought upon in the way of his trade, are protected from distress while in his custody. As the carcass of a beast sent to a butcher; to be slaughtered for the sender.

903. FRANK v. FRANK, 1 Ch. Ca. 84.

Where a compromise, founded in mistake, and proceeding from the misrepresentation of one brother, was held binding on the other.

Doubted in Leonard v. Leonard, 2 Ball. & Beat. 182, 3:—"If the facts be correctly stated, I can only say, that it appears to me to be a very unsatisfactory decision; it comes from a book of very doubtful authority, and the result of it is, as there reported, to give the younger brother the benefit of a gross misrepresentation made by him to his elder brother.

904. FREAN v. CHAPLIN, 2 Dowl. Pr. 523.

Where the plaintiff declares in vacation, the defendant is entitled to an imparlance.

Overruled in Nurse v. Geeting, 3 Dowl. Pr. R. 157.

905. FREDERICK LUMLEY SAVILE, dem. of, v. JOHN LUMLEY SAVILE, 3 Ad. & Ell. 2.

Reversed in John Lumley Savile v. Frederick Lumley Savile, 3 Ad. & Ell. 897. (30 Com. Law, 12, 259.)

906. FREEMAN v. ADAMS, 9 John. R. 115; and Myers v. Dixon, 2 Hall. 456.

That an action of debt on an arbitration bond cannot be maintained, where the time for making the award has been extended by agreement under seal, or otherwise.

Oppo. Greig v. Talbot, 3 D. & Ry. R. 446: *Held*, that if the agreement to extend the time is under seal, an action of debt upon the original bond will lie, on showing that the condition thereof was varied by the obligor, by an instrument under seal.

907. FREEMAN v. BARNARD, 1 Ld. Raym. 247, 248; Salk. 69; 12 Mod. 130.

The distinction there taken no longer exists. Vid. Armstrong v. Masten, 11 Johns. 190.

908. FREEMAN v. JURY, 1 Mo. & M. 19.

A. being in possession under a lease for years, underlet the premises

from year to year to the defendants, who knew the extent of A's. interest. The plaintiff afterwards took a lease of the same premises, expectant on the determination of A's. term; and the defendants, after the determination of A's. term, continued in possession for a quarter of a year, when they paid the rent for that period, and claimed to give up the premises: Held, in an action for use and occupation for a subsequent period, that there was no evidence of a tenancy continuing beyond that quarter of a year.

Doubted in Woodcock v. Nuth, 8 Bing. 170—Alderson, J.]

909. FREEMAN v. LUCKETT, 2 J. J. Marsh, 309.

S. P. as in The Trust. of Lansingburgh v. Willard, (post.)

910. FREEMAN v. WEST, 2 Wils. 165.

Lease *habendum a die datus;*—objected that the day of date being exclusive, this created a freehold to commence *in future*, and therefore void. Agreed by Pratt, C. J. that the day of date is *exclusive.*

But see Pugh v. D. of Leeds, Cowp. 714; where it is settled that 'from' is inclusive or exclusive, according to the intent of parties.

Note. Pratt, C. J. said "this old principle of law, that a freehold cannot pass to commence *in futuro* has no good reason or ground to stand upon, at this day."

See also Reeve on Domestic Relations, 7. 117. acc.

911. FREEMAN'S REPORTS.

Said arguendo to be a book of no authority. Upon which Lord Mansfield observed, that some of the cases in Freeman, were very well reported. Cowp. 15—"better than they are supposed." 3 Ves. Jr. 580; Cowp. 15 note.

912. 2 FREEM. R. 206. (case 280.)

The person entitled to a remainder in personal estate may call for security from the tenant for life, that the property should be forthcoming at his decease.

Overruled in Foley v. Burnell, 1 Bro. Ch. R. 279, and Hudson v. Wadsworth, 8 Conn. 348: unless in a case of real danger. Hudson v. Wadsworth, supra. and Mortimer v. Moffat, 4 H. & M. 503.

913. FREEMOULT v. DEDIRE, 1 Pr.Wms. 430. and Plunkett v. Penson, 2 Atk. 290.

That an estate descending to an heir, charged expressly the will of the ancestor with the payment of his debts, was not equitable assets in the hands of the executor, but was legal assets in the hands of the heir.

Overruled in Burt v. Thomas, (Court of Exchequer;) Silk v. Prime, Dickens, 384; Hargrave v. Tendall, 1 Bro. C. C. 136; Batson v. Lin-

degreer, 2 ib. 94; Bailey v. Ekins, 7 Ves. 319; Shepherd v. Lutwitdge, 8 ib. 26; Benson et al. v. Le Roy, 4 J. Ch. R. 657; Helm v. Darby's Adr., 3 Dana, 185.

914. FRENCH v. M'ILHANY, 2 Binn. 13.

Doubted in Clayton v. Clayton, 3 Binn. 476. Vid. also 14 S. & R. 90.

915. FRENCH v. MORGAN, 2 Moll. Ch. R. 488.

Overruling Cupit v. Jackson, 13 Price, 721.

916. FREND v. THE DUKE OF RICHMOND, Hard. 505.

Ld. Hale says, if a record be removed into K. B. out of C. B. by writ of error, and afterwards amended by rule of C. B., the K. B. *must* amend it.

Explained by Best, C. J. in 3 Bing. 146; 'the word *must*, is too strong.' Savage, C. J. (5 Wend. 112). 'The question is at any stage of the proceedings whether substantial justice requires the amendment; —and in (6 Cowen, 606), allowed after judgment reversed on error.'

917. THE FRIENDS, 4 Rob. Adm. R. 143.

Where a seaman was taken out of a captured vessel; but the vessel was afterwards recaptured, held, that he was not entitled to his wages; the seaman being a prisoner at the time of the recapture.

Overruled in Bergstrom v. Mills, 3 Esp. R. 36.—Ld. Eldon. See 1 Pet. Adm. R. 115. 123.

918. FRIERE v. WOODHOUSE, 1 Holt's N. P. R. 572.

In effecting a policy of insurance, a circumstance of intelligence, inserted in Lloyd's lists, need not be communicated to the underwriters, however important it may be to the computation of the risk; for it is to be presumed within their knowledge, and to be taken into account.

Overruled in Elton v. Larkins, 8 Bing. 198.

919. FRISBIE v. HOFFNAGLE, 11 John. 50.

Denied in Lloyd v. Jewell & al., 1 Greenl. R. 359. Mellen, C. J.:— "On examination of the cases of Morgan v. Richardson, 1 Camp. N. P. 40 note; Tye v. Gwynne, 2 Camp. 346, and Barber v. Backus, Peake's Cas. 61. all which are cited at the end of Frisbie v. Hoffnagle, it will be found that they are totally different from that case in principle and do not in any degree support it."—"That is an insulated case."

920. FRITH v. LAWRENCE, Adm., 1 Paige, 434.

Reversed in Mactier's Adm. v. Frith, 4 Wend. 103.

921. FROST v. BEEKMAN, 1 J. Ch. R. 288.

Reversed in Beekman v. Frost, 18 John. R. 544: *held*, that no party

shall be allowed to surprise or mislead his adversary. Thus, if a party in the court below, shall purposely suffer a decree or judgment to pass against him, without contesting it there, he shall not be heard here; or, if counsel shall, for the first time, raise a point here, which might have been obviated, had it been made in the court below, he ought to be permitted to do so.

Also, that a mortgage for $3000, which by mistake is registered for but $300, is notice to a *bona fide* purchaser for the latter sum only.

922. FRY v. HILL, 7 Taunt. 397.

Held, that what is reasonable time for presenting a bill, payable after sight, for acceptance, is always a question of fact to be determined by a jury.

Denied in Chit. on Bills, 412, 413, (8th ed.)

923. FRYER v. BERNARD, 2 P. Wms. 261, and Arglasse v. Muschamp, 1 Vern. 75

In respect to the power assumed, (in 1682 and 1724), of granting a sequestration against the estates of a defendant situated in Ireland.

Denied in Ld. Parlington v. Soulby, 3 M. & K. 104. (8 Cond. 298), as to the grounds upon which the court proceeded: *held*, that an injunction to restrain the defendants from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt is within the jurisdiction of the Court of Chancery in England; this jurisdiction is grounded on the circumstance of the person of the party on whom the order is made being within the power of the court; the Ld. Chancellor saying:—"If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad;—if, for instance, as in Penn v. Ld. Baltimore, 1 Ves. sen. 444, it can decree the performance of an agreement touching the boundary of a province in North America; or, as in the case of Toller v. Carteret, 2 Vern. 494, can foreclose a mortgage in the Isle of Sark one of the channel islands; in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing any thing abroad, whether the thing forbidden be a conveyance or other act in *pais*, or the instituting or prosecution of an action in a foreign court."

924. FRY and WIFE v. PORTER, 1 Mod. 307.

Vaughan.—"I wonder to hear of citing of precedents in matter of equity. For if there be equity in a case, that equity is an universal truth, and there can be no precedent in it.—If it be the same with this case, the reason and equity is the same in itself.—And if it be not the same, it is not to be cited, being not to that purpose."

Denied in Turner v. Harvey, Jacob, 169; Woodmerton v. Walker,

2 Russ. & M. 197. "Equity is a roguish thing. For law we have a measure,—know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make the standard for the measure, a chancellor's foot: 'tis the same thing in the chancellor's conscience." Selden's Table Talk, tit. Equity; 3 Bl. C. 432, n.; 2 Swanst. 414. This however, is according to the maxim *dulce est decipere in loco.* Lord Keeper Bridgman says, "Certainly precedents are very necessary and useful to us, for in them we find the reasons for the equity to guide us; and, beside, the authority of those who made them is much to be regarded." 1 Mod. 307.

925. FURSAKER v. ROBINSON, Prec. in Ch. 475; 1 Eq. Cas. Abr. 123. pl. 9.

Courts of equity will not lend their aid to enforce securities given as the *præmium pudicitiæ.*

Overruled in Knye v. Moore, 1 Sim. & Stu. 61; 2 P. Wms. 432. See Gardner v. Heyer, 2 Paige's Ch. R. 11.

926. GADSDEN'S Ex. v. LORD'S Ex., 1 Desaus. R. 208.

Overruled in Stock v. Parker et al., 2 M'Cord's Ch. R. 377, 384, and cases cited.

927. GAGE v. ACTON, 1 Salk. 327; 1 Ld. Raym. 115.

Ld. Holt:—"That when the wife has any right or duty, which by possibility may happen to accrue during the marriage, the husband may by release discharge it."

Denied in Honner v. Morton, 3 Rus. 65. (3 Cond. R. 298); also 4 Term, 385.

928. GAGE'S CASE, 5 Rep. 45.

Error to reverse a fine, for that the writ bore *teste after* the return day, and it was held to be amendable.

—"But it is not rightly reported by Ld. Coke, and it has been contradicted in many cases since, and held not to be law." Vid. Wynne v. Thomas, Willes, 568, and the cases there cited.

929. GALBRAITH v. WYTHE, 1 Hayw. 464.

Held that if a man sell an unsound horse, whose disorder is not known, and receive a sound price, he is liable to an action, which may be *assumpsit.*

Contrary to Baglehole v. Walters, 3 Camp. 154; Pickering v. Dowson, 4 Taunt. 779; Emerson v. Brigham, 10 Mass. 197.

930. GALLOWAY v. MORRIS, 3 Yeates, 445.—Shippen.

Denied in Bronde v. Haven, 1 Gilpin, 605.—Hopkinson.—See also The Cynthia and Anony. 1 Ld. Raym. 739 (ante).

931. GAMMAGE v. WATKIN, 2 Str. 975.

Where the original debt is too small to require special bail, the addition of costs will not alter the case, though both together exceed £10.

Overruled in Lewis v. Pottle, 4 D. & E. 570.

932. GARDNER'S CASE, 2 Roll. Rep. 160.

That if an executor give the legatee a bond for payment of the legacy, this is no extinguishment.

Denied. Cuband v. Dewsbury, 8 Mod. 328; Goodwyn v. Goodwyn, Yelv. 39; McTun v. Ferguson's Ex'rs., 1 Bay, 112.

933. GARDINER v. CAMPBELL, 15 Johns. 401.

That replevin will not lie against an officer who had taken goods on an execution, but who afterwards received the full amount of the same, with all charges, but refused to redeliver the goods to the debtor.

Considered and denied in Baker & al. v. Fales, 16 Mass. 153.

934. GARDINER v. SHELDON, Vaugh. 262.

That an heir shall never be disinherited except by express words, or such as have a *necessary* implication.

Considered and denied by Willes, Ld. Ch. J. in Moore v. Heaseman, Willes, 140. and in Fulham v. Wickett, Willes, 309.

935. GARDNER v. The Ship NEW JERSEY, 1 Pet. Adm. R. 227.

The master has a claim for disbursements abroad.

Oppo. Smith v. Palmer, 1 B. & Ald. 575; Atkinson v. Cotesworth, 5 D. & R. 552; Fisher v. Willing, 8 S. & R. 118.

936. GARDNER v. TURNER, 2 J. R. 260.

Upon a challenge to a juror, if the *triors* find against the plaintiff, the latter must proceed in the cause, or he will be in default.

Doubted in Pringle v. Huse, 1 Cowen, 435.

937. GARMENT v. BARRY, (or BARRS) 2 Esp. 673.

Overruled in Jones v. Cowley, 6 D. & Ry. 535, 6.—Bayley:—"It is indeed exceedingly difficult to distinguish this case from Garment v. Barry, but I must confess that I was never perfectly satisfied with the reasoning of Ld. Ch. J. Eyre in that case. He there lays it down, that in order to constitute a variance, the injury under which the horse labored must be of a permanent nature, and not one arising from a temporary accident. If that reasoning be correct, the warranty in many

cases will be contingent, and will ultimately prove either general or qualified accordingly as the injury shall eventually turn out to be permanent or temporary."

938. GARR v. GOMEZ, 6 Wend. R. 583.

Reversed in 9 Wend. 649, in part.

939. GARRELLS v. ALEXANDER, 4 Esp. 37.

Handwriting was proved by a person who had seen the party write once, and said the writing was like that, but would not take upon him to say he believed it to be the party's writing.

Doubted per Ld. Eldon in Eagleston v. Kingston, 8 Ves. Jr. 474, 5, 6.—Ld. Eldon. Sed. see the observations of Kennedy, J. in 2 Whart. R. 401, *et seq.* and Beauchamp v. Cash, 16 Com. Law R. 410; D. & Ry. R. 3, S. C.

940. GARRIGUES v. COXE, 1 Binn. R. 592.

Held, that a leak in a vessel caused by rats, without the fault of the captain, was within the terms " perils of the sea," so as to entitle the insured to recover against the underwriter.

Overruled in Aymar v. Astor, 6 Cowen, 266. and *cases cited.* See Dale v. Hall, (ante).

941. GASKELL v. LINDSAY, 1 Holt's N. P. R. 212.

The court set aside the verdict, which had been found for defendant, and directed a verdict to be entered for the plaintiff. See ib. 677. n.

942. GARTH v. TAYLOR, Freem. R. 260. (ed. 1826.) (C. 282).

Better reported in 2 Bac. Abr. 388, 9, (5th ed.)

Freem. p. 287, (ed. 1826.) (C. 335). The administrator, *durante minoriate* of the executor of an executor, is the representative of the first testator.

Oppo. Limmer v. Every, Cro. El. 211, as cited by Ld. C. B. Gilbert in Bac. Ab. Ex. (B). 1. (2 v. p. 381, 5th ed.) but this case hardly supports him; and in Leonard's report of the same case under the name of Limver v. Everie, 4 Leon. 58, it is said only that such an administrator should sue as administrator of the first testator. S. C. cited Godolphin's Leg. p. 89; and see Norton v. Molineux, Hob. 246; Freem. p. 287, n. (a).

943. GEARY v. SWAINE, 1 Lutw. 464, and 3 Salk. 391.

Denied in Dearden v. Binns, 1 M. & Ry. 135, n. (c) :—" The notice of the case in Salkeld, seems to be a short and inaccurate abstract of part of the report in Lutwyche."

944. GEER v. PUTNAM, 10 Mass. R. 312.

A promissory note made on Sunday, was adjudged good, on demurrer.

Doubted in No. 26, Am. Jurist, (April 1831.) p. 381; Smith v. Sparrow, 4 Bing. 84. But see Williams v. Paul, 6 Bing. 653; Smith's M. L. 316; Foster v. Taylor, 3 Nev. & M. 244.

The prohibition in our statute, relative to the observance of Sunday, against exposing to sale on that day any goods, chattels, &c. extends only to the public exposure of commodities to sale in the streets or stores, shops, warehouses, or market-places; and it was accordingly held, that a transfer of personal property made on Sunday, was valid, and the title to the property passed. Boynton v. Paige, 13 Wen. 425.

945. GEORGIER v. MIEVILLE, 4 Dowl. & Ry. 641.

Doubted in Gordon v. Cuming, 1 Hud. & Brookes R. 67, (Ireland); it being different from the report of the same case in 3 B. & Cres. 45.

946. GEORGE v. PRITCHARD, Ry. & Mo. 417.

On an agreement in general terms, to sell an existing lease, Ld. Tenterden was of opinion, that no contract to make out a complete title would be implied, and that the vendor without an express stipulation, was *not* bound to produce his lessor's title.

Overruled in Souter v. Drake, 3 Nev. & M. 40; 5 B. & Adol. 992, S. C.

947. GERMAN v. ORCHARD, Freem. 500.

Reversed in Ex. Ch. Skinner, 528; and the reversal affirmed in *dernier resort*. Show. P. C. 199, 200.

948. GERWAS v. BURTCHLEY, 2 M. & Malk. 150.

Affidavits for or against the admissibility of early executions, held not admissible.

Oppo. Ruddick v. Simonds, 1 M. & Rob. 184.

949. GIBBONS v. OGDEN, 17 J. R. 488.

Reversed in 9 Wheat. 1.

950. GIBBS v. ALIBERTI, 4 Yeates, 373.

Explained by Ch. J. Tilghman, in 12 S. & R. 417.

951. GIBSON v. DICKIE, 3 M. & Selw. R. 463.

Oppo. Binnington v. Wallis, 4 B. & Ald. R. 650.

952. GIBSON v. HUNTER, 2 H. Bl. 207.

The demurrant shall admit *every fact*, which the evidence of his adversary conduces to prove.

Oppo. Hansbrough's Ex. v. Thom, 3 Leigh, 147; 2 Rand. 357; 5 ib. 4; the Virginia practice stated.

953. GIBSON v. PATTERSON, 1 Atk. 12.

That if in the sale of an estate, it be stipulated that the price shall be paid or the title be completed, by a certain day, and neither is done; still, the contract shall be enforced; for the general rule is, *not to consider the time as of the essence of agreements.*

Ld. Loughborough said this report was incorrect; and that from the note-book of Ld. Hardwicke, which he examined, the case was decided wholly upon the evidence; and did not call for the opinion attributed to him. Harrington v. Wheeler, 4 Ves. Jr. 689.

954. GIBSON v. PATTERSON, 1 Atk. 12.

'Ld. Hardwicke seems to have laid down the doctrine that lapse of time was of no importance; and to have decreed in favor of a vendor, without any regard to his negligence in not procuring his title deeds, and notwithstanding a conveyance within the time limited for the purpose by the articles.'

Overruled in Lloyd v. Collet, 4 Bro. 469; Getchell v. Jewitt, 4 Greenl. R. 361, 2; "The generality of the principle laid down by Ld. Hardwicke has been overruled, and a different one established." See also 2 Brock. R. 246.—Marshall.

955. GIBSON v. WELLS, 4 B. & P. 290.

That case will not lie for permissive waste.

Denied in White v. Wagner, 4 Har. & T. 378, and 389, *et seq.* Counsel arguendo and in 4 K. C. 78. n. (e), the observations are considered just.

956. GIFFORD v. HORT, 1 Scho. & Lef. 386.—Lord Chancellor.

'I am bound to say of the decree of Gifford v. Hort that it is right: for it is the order of the House of Lords. One very great lawyer supported that decree, but I happen to know that another very great lawyer had great doubts about the decree, in Gifford v. Hort.' Lansdown v. Beauman, 1 Moll. Ch. R. 91.

957. GILBERT ON DEVISES, 15.

That a devise to an alien, and also to the heir of an alien, is void.

Denied in Fox v. Southack, 12 Mass. 146.

958. GILB. ON EV., 23.

Held that a copy of a lost record may be admitted when it is according to the rule of the civil law, *vetustate temporis aut judiciaria cognotione roborata.*

Denied, in Gress. Eq. Ev. 112.

959. GILB. EV., 108; 1 Phill. Ev. 63. (7 Lond. ed.)

An agreement by the plaintiff to give the witness a lease in case he recovers, will exclude his evidence. See 9 Pick. 322.

Doubted in Ten Eyck v. Bill, 5 Wend. 55. Vid. Seaver v. Bradley, 6 Greenl. 60. Sed see Hovill v. Stephenson, 3 Mo. & P. 146.

960. GILBERT'S (EQUITY) REPORTS.

'The court exploded the book and told the Serjeant they hoped he would quote cases from some better authority.' Clarke's Bib. Legum.

961. GILCHRIST v. BROWN, 4 D. & E. 766.

Admits the liability of feme covert, living on a separate maintenance to be sued as feme sole.

Overruled in Marshall v. Rutton, 8 D. & E. 545.

962. GILL v. CUBITT, 9 B. & C. 466.

Overruled. Crook v. Jadis, 5 B. & Adol. 909; Backhouse v. Harrison, ib. 1098; Brush v. Scribner, 11 Conn. 395—Williams, C. J.

963. GILL v. DUNLOP, 7 Taunt. 193.

Reversed in Dunlop v. Gill, 1 B. & Ald. R. 334.

964. GILLESPIE v. MOON, 2 J. Ch. 585.

That a mistake in any deed or contract in writing may be shown by parol proof, and relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defence.

Doubted in Elder v. Elder, 1 Fairf. R. 87—Weston, J. who says :—" We have looked into the cases cited by him, but are not satisfied that they sustain the doctrine to the extent his language would seem to imply."

965. GILPIN'S CASE, Cro. Car. 161.

Overruled. Doe v. Timins, 1 Barn. & Ald. 530; see Clarke v. Smith, 1 Salk. 241; Chaplin v. Leroux, 5 M. & S. 14; Langley v. Sneyd, 3 Brod. & Bing. 243. See also note (a) to Brittane v. Charnock, Freem. R. p. 247; (C. 263.) (ed. 1826.)

966. GILPIN v. ENDERBEY, 5 B. & A.—did not satisfy Lord Eldon. Brophy v. Holmes, 2 Moll. Ch. R. 8.

967. GIST v. MASON, 1 D. & E. 84.

The opinion of Ld. Mansfield which may be collected from this case, that insurance of enemies' property is legal, is controverted by Buller J. in Bell v. Gilson, 1 Bos. & Pul. 354.

968. GLADSTONE v. KING, 1 M. & Selw. 35.

If the Master of a vessel neglects to communicate material facts to the owners; held, that the plaintiffs could not recover for previous loss; the antecedent loss being an implied exception out of the policy.

Overruled in the Gen. Int. Ins. Co. v. Ruggles, 12 Wheat. R. 408; 4 Mason, 74, S. C.

969. GLEASON v. PINNEY, 5 Cowen, 152.

Reversed in Pinney v. Gleason, 5 Wend. R. 393: held, that the measure of damages in an action for not paying a note given thus, "for value received, I promise to pay A. B. $79,50 on, &c. *in salt at fourteen* shillings per barrel," is the *sum* specified, and not the value of the salt on the day mentioned for payment. Vid. Clark v. Pinney, 7 Cow. 681, and M'Donald v. Hodge, 5 Hayw. R. 85, *seem contra.*

970. GLOVER v. KENDALL, 1 Lutw. 893.

That an ex'r. cannot maintain an action in his own name vs. a sheriff for the escape of a prisoner who was in execution on a judgment obtained by him as executor.

Overruled in Bonafous v. Walker, 2 D. & E. 126

971. GODBOLT, GOLDSBORROW & MARCH.

'Mean reporters, but yet not to be rejected.' North's Study of the Laws, p. 24.

972. GODIN v. THE LONDON ASSURANCE CO., 1 Burr. 489,—double insurance.

Yates, J., in 11 John. R. 238.—Ld. Mansfield "could never have intended that two insurances on the same ship, *not for the same entire risk*, was a double insurance."

973. GODLINGTON v. LEE, T. Raym. 14.

Overruled. Milner v. Petit, 1 Ld. Raym. 720; Gilb. on Debt, 396; 12 Mass. 1.

974. GOFF v. DAVIS, 4 Price, 200; Lodge v. Dicas, 3 B. & Ald. 611; David v. Ellice, 5 B. & C. 196.

Doubted. Thomson v. Percival, cited in Tyrw. R. 497; Parke, B.

975. GOIX v. KNOX, 1 J. Cas. 337.

Reversed in Goix v. Low, 2. J. Cas. 48: *Held*, that being condemned as lawful prize, afforded no legal inference that the vessel was enemy's property; the sentence of the Admiralty Court not being conclusive.

976. GOLD v. BISSELL, 1 Wend. R. 213.

"That where a warrant cannot legally issue without oath, but is so issued, all the parties concerned in the arrest under such process are trespassers."

Limited in Savacool v. Boughton, 5 Wend. 179, by Marcy, J. to such as have knowledge that the warrant had not been duly sued out:

977. GOLDING v. DIOS, 10 East, 2.

Overruled in Ricketts v. Lewis, 1 B. & Ad. 197, upon one point.

978. GOODALL v. SKELTON, 2 H. Bl. 316.

S. P. as in Langfort v. Tyler, (post.)

979. GOODENOW v. TYLER, 7 Mass. R. 35.

Held, that a factor does not make the debt his own, by taking a note payable to himself, unless he refuse to deliver it the principal on demand, or negotiate it, or otherwise appropriate it to his own use, it being proved to be the usage in Boston, for factors to sell on credit, and take notes in that form.

Doubted in Symington v. M'Lin, 1 Dev. & B. 291 ; Ruffin, C. J.

980. GOODIER v. PLATT, Cro. Car. 471.

——was decided on the principle that a judgment cannot be reversed in *part only*.

Overruled. Vid. Cutting v. Williams, ante.

981. GOODRIGHT v. HARWOOD, 3 Wils. 497. C. B.

Reversed on error in B. R. Cowp. 87. and the judgment of reversal affirmed in Dom. Proc. 7 Bro. Parl. Ca. 344.

982. GOODRIGHT v. MOSS, Cowp. 591.

"Lord Thurlow was most studious to contradict this case, and he learned his doctrine in the same school, (i. e. the western circuit.) So had the Chief Justice, (Mansfield,) and Mr. Justice Heath." Per Ld. Eldon, in the case of the Berkley Peerage, 4 Camp. 401. 420.

983. GOODRIGHT v. STRAPHAN, Cowp. 201.

Questioned in Lee v. Muggeridge, 5 Taunt. 36.

984. GOODSELL v. MYERS, 3 Wend. 479.

The negotiable note, of an infant is voidable, not void.

Overruled in M'Mian v. Richmond, 6 Yerg. R. 1; 1 Camp. 553, note ; 10 J. R. 33; 9 Mass. 100 ; 3 N. H. R. 348. See Swasey v. Adm. of Vanderheyden, (post.)

985. GOODTITLE v. ALKER, 1 Burr. 143.

"Ejectment will lie by the owner of the soil for land, which is subject to a passage over it as the king's highway."

Overruled in City of Cincinnati v. The Lessee of White, 6 Pet. R. 431, 442; Thompson. See also Doe v. Jackson, 2 D. & Ry. 523;—Bayley; Stiles v. Curtis, 4 Day, 328; Peck v. Smith, 1 Con. R. 103.

986. GOODTITLE v. BAILEY, Cowp. 597.

In this case, and that of Yea v. Bucknell, Cowp. 473; Ld. Mansfield, (followed by Buller J. in 2 D. & E. 581.) considered contracts for leases, to be, between the parties, operative at law, as leases.

But this doctrine is doubted by Ld. Redesdale, 1 Sch. & Lefr. 66.

987. GOODTITLE v. BRAHAM, 4 T. R. 497.; S. P. Cator's case, 4 Esp. 117; Hess v. The State, 5 Ohio R. 6; State v. Caudler, 3 Hawks, 393.

Admitted persons skilled in detecting forgeries, to prove a particular handwriting not genuine.

Oppo. Cary v. Pitt, Peake Ev. App. 85; Gurney v. Langlands, 5 B. & A. 330; Lodge v. Phipher, 11 S. & R. 333; 1 Penn. R. 161.

988. GOODTITLE, d. CHESTER v. ALKER et al., 1 Burr. 133.

Held, that ejectment would lie for a highway, by the owner of the soil, *subject to the easement.*

Denied in Stiles v. Curtiss, 4 Day, 330, 331; Peck v. Smith, 1 Conn. 103; and it seems in City of Cincinnati v. The Lessee of White, 6 Pet. U. S. R. 431, an express decision contrary.

989. GOODTITLE v. NORTH, Doug. 584.

That bankruptcy is no plea to an action of trespass for mesne profits, because the damages are so uncertain.

Denied in Hatten v. Speyer, 1 Johns. 42.

990. GOODWIN v. BLACKMAN, 3 Lev. 334.

Ejectment of the tenth part of a messuage, described as lying in two parishes, and proved to lie in one only: and held that the declaration was not maintained, being for precisely the tenth part of an entire thing.

Called "a strange case"—"contrary to all experience." Per Denison, J. in Burr. 330.

991. GOODWIN v. RICHARDSON, 11 Mass. 469.

S. P. as in Thornton v. Dixon, (post.)

992. GORDON v. CALVERT, 2 Simons' R. 253; (4 Russ. R. 581, S. C.)

Doubted. In Gass v. Stinson, 2 Sumn. R. 453. 467, 8.—Story.—"In cases of this sort, where a bond is given for the fidelity of a party for an indefinite period, I am aware, that it has been supposed, that at law the obligation created by the bond, cannot be determined at the

will of the surety by notice. That was intimated by Mr. J. Bayley, in Calvert v. Gordon, (7 B. & C. 809,) and afterwards confirmed by the whole court, in the same case, in 3 Mann. & Ryl. 124. That doctrine may well be maintained at law. I am aware, that the same doctrine seems to prevail in equity; for in the case of Gordon v. Calvert, (2 Simons, 253; 4 Russ. R. 581,) it seems to have been held that notice would not terminate the liability; and that it was no more a defence in equity, than at law. I confess, that I should yield with more reluctance to this latter doctrine, though I am by no means prepared to say, that it is not maintainable."

993. GORDON v. MASS. F. & M. INS. CO., 2 Pick. 249; Per Thompson, J. in 5 Pet. R. 604.

S. P. as in Cambridge v. Anderton, (ante)

994. GORE v. KNIGHT, Pr. Ch. 255.

Denied in Ly Massarene v. Doran, 2 Moll. Ch. R. 524.

995. GORDON & al. v. SECRETAN, 8 East, 548.

Restricted in its application, Pearce v. Hooper, 3 Taunt. 62; Betts v. Badger, 12 Johns. 223.

996. GOSS v. WATLINGTON, 3 Bro. & Bing. 132.

Receipts signed by a deceased collector of taxes, for monies payable to him in his official capacity, are admissible in evidence against his surety in an action on a bond conditioned for the due performance of the collector's duty; the point was not decided, but Dallas, C. J. held them inadmissible.

Doubted in Middleton v. Melton, 10 B. & C. 317. In this case also the *grounds* upon which the court (in Goss v. Watlington) decided the principal point in that case, were *overruled*; viz:—That the entries made by such collector were admissible, because they were made in a *public book*, handed down to him by his predecessor in office.

997. GOSS v. WITHERS, 2 Burr. 694.

Where it seems to be held, that the right to recover for a total loss is not made absolute by the state of facts on which the abandonment is founded, but is dependent on subsequent events.

Denied in Maryland & Phœnix Ins. Co. v. Bathurst, 5 G. & J. 159.

998. GOULD v. ROBSON, 8 East, 580.

Oppo. Ld. Ellenborough, 1 B. & Ald. 252, and see Tippetts v. Heane, 4 Tyrw. R. 776, n (a).

999. GOULAND v. DE FARIA, 17 Ves. 20.

Lord Chancellor was not satisfied at the time, that that case was decided on true principles of equity, and advised an appeal from that decree, and it would have been appealed from, but the plaintiff submitted to a compromise. Scott v. Dunbar, 1 Moll. Ch. R. 459.

1000. GOVETT v. RADNIDGE, 3 East, 62.

Denied in Walcott v. Canfield, 3 Conn. R. 198 :—" The above case has been considered as of no authority. Powell v. Layton, 2 New R. 364 ; Max v. Roberts & al., ib. 454. The same court, which determined the case of Govett v. Radnidge, in the recent determination of Weall v. King, & al., 12 East, 452, have virtually overruled their former decision."

1001. GRACE v. WILBER, 10 John. R. 455.

Reversed in Wilber v. Grace, Jr. 12 John. 68.

1002. GRANBERRY v. GRANBERRY, 1 Wash. 249.

The manner of stating interest in executor's accounts.
Modified in Burwell v. Anderson, 3 Leigh R. 363, 4.

1003. GRANT v. BELL, 4 Har. & M'H. R. 419.

Overruled in Green's Ex. v. Johnson, 3 G. & J. 396, 7.

1004. GRANT v. MILLS, 2 Ves. & B. 306.

Held, that vendor's lien on the estate for the purchase money was not discharged by taking bills of exchange.

Doubted. See Eskridge v. M'Clure, 2 Yerg. R. 84 ; 4 K. C. 152.

1005. GRAVES v. MATTISON, Sir T. Jones R. 201 ; 1 Eq. Ca. Ab. 336, pl. 1.

Leading case as to mortgage or sale of a reversionary term for raising portions or maintenance for children.

Denied in Revesby v. Newland, 2 P. Wms. R. 93. Sed see 1 Powell on Mort. p. 74. n. (s).

1006. GRAY v. HANDKINSON, 1 Bay's R. 278; See 16 S. & R. 258 ; 3 Pick. 452.

Where the defects of the things sold are not so great as to require a rescission of the contract *in toto*, then an abatement of the price ought to be allowed. Thus where a mill-seat was the object in view in purchasing the land, that being taken away by elder grant, the vendee was allowed to plead the matter in discount against the bond given for the consideration.

Oppo. Greenleaf v. Cook, 2 Wheat. 13; Day v. Nix, 9 Moore's R. 159; 3 Fairf. R. 127; 3 Dev. R. 390.

1007. GREELEY v. THURSTON, 4 Greenl. R. 479.

A bill may be presented for payment at any reasonable time on the third day of grace.

Oppo. Osborn v. Monroe, 3 Wend. 170.

1008. GREEN v. EDWARDS, Cro. El. 217.

Lease for years, if lessee live so long; remainder to another for the residue of the term: and remainder held void.

But this and the like cases are overruled in Wright ex dem. Plowden v. Cartwright, 1 Burr. 282.

1009. GREEN v. FARMER, 4 Burr. 2214.

Dyer has no lien on goods delivered to him in the course of trade, but for the price of dying.

Denied in Rose v. Hart, 8 Taunt. 499—Gibbs. See Bennett v. Johnson, 3 Dougl. 387, and notes (a) (b).

1010. GREEN v. RIVET, 2 Ld. Raymond, 772.

That a bill of Middlesex cannot be returned the same day it was sued out.

Overruled in 4 Term R. 610; and held that it may be.

1011. GREEN et al. v. DENNIS, 6 Conn. R. 292.

Doubted in Lessee of Ferguson et al. v. Hedges, 1 Harr. (Dela.) R. 524.—Clayton.—"We are not unaware of the American decisions on this subject in 6 Conn. R. 292, and in Lingan v. Carroll, 3 Har. & M'Hen. 333; but we prefer following the authorities which we have cited." The case in Delaware decides that a lapsed bequest of real property goes to the heir at law; a *void* one to the *residuary devisee.*

1012. GREENLEAF v. COOK, 2 Wheat. R. 16.

To make a failure of consideration a defence to a note, the failure must be total.

Opposed. Lounsbury v. Ball, 12 Wend. 246, *and cases cited.*

1013. GREENLEAF v. KELLOGG, 2 Mass. 568. supp.—As to allowance of compound interest.

Overruled. "This part of the case was overruled in Hastings v. Wiswell, 8 Mass. 455, at a term of the court where Parsons, C. J. presided, who was counsel for the plaintiff in the former case, and had cited it with approbation in Tucker v. Randall, 2 Mass. 284, as to the main point decided." Per Weston, J. in 7 Greenl. 50.

1014. GREENAWAY v. ADAMS, 12 Ves. 395.

S. P. as in Denton v. Stuart, (ante).

Overruled in Gwillim v. Stone, 14 Ves. 128; Jenkins v. Parkinson, 1 Coop. Sel. Cas. 179; (8 Cond. 432.)

1015. GREENWAY v. CARRINGTON, 7 Price, 564.

Overruled in Walthew v. Syers, 3 Dowl. Pr. 160; Dawson v. Bowman, ib. 160, 161.

1016. GREEVES v. ROLLS, 2 Salk. 456.

This case is wrong in Salkeld. Better reported in 12 Mod. 651. and 1 Ld. Raym. 716; Vid. 1 Burr. 359.

1017. GREEVES v. WEIGHMAN, 2 Rol. Abr. 919. D. 2.

That if a man make two wills, and the executor under the first will prove it and receive a debt, and afterwards the second will be found and proved; the last executor may recover the debt of the debtor, whose remedy is on the first executor.

Denied per Buller, J. in Allen v. Dundas, 3 D. & E. 125.

1018. GREGORY v. CHRISTIE, B. R. Trin. 24 G. 3; Park, 67.

Ld. Mansfield's construction of the permission, in a policy "to touch and stay," is denied by Sir J. Mansfield, C. J. in Urquhart v. Barnard, 1 Taunt. 456.

1019. GRESHAM v. GRESHAM, 6 Munf. R. 187.

S. P. as in Timberlake v. Graves.

1020. M'GREW'S APPEAL, 14 S. & R. 396.

Limited in M'Fadden v. Geddes, 17 S. & R. 341.

1021. GREY v. KENTISH, 1 Atk. 280.

The Chancellor said, "The case is most inaccurately reported. As stated in Atkins, it is unintelligible: and it is only by attending to the correction of it, in a note, by Mr. Cox, that we are able to as certain what the true facts were." Houner v. Morton, 3 Rus. 65; (3 Cond. R. 301).

1022. GRIDLEY v. GARRISON, 4 Paige, Ch. R. 647.

The lien of an attorney for his costs of suit, cannot be affected by a set-off of a judgment in another suit; the lien being paramount to the claim of the adverse party.

Overruled in 16 Wend. 446. Sed see Cowell v. Snow, 10 Bing. 432.

1023. GRIFFITH v. EYLES, 1 B. & P. 413.

It is said, in an action for an escape, if the defendant plead a negli-

gent escape and voluntary return, the plaintiff should new assign a subsequent escape.

Denied in Howland v. Squier, 9 Cowen, 91, and in The Middle District Bank v. Deyo, 6 Cowen, 735.

1024. GRIFFIN v. TAYLOR, Tothill, 106.

The Court ordered a man to procure his wife to acknowledge a fine of mortgaged lands.

Overruled in Howell v. George, 1 Mad. R. 1; Davis v. Jones, 1 New R. 267.

1025. GRIFFITH'S LESSEE v. TUNCKHOUSER, 1 Pet. R. 421.

That a connected plot of different tracts made out and put together in the land office, was not evidence, because it did not profess to be a copy of any plot on record in the office.

Denied in Vickroy v. Skelley et al., 14 S. & R. 375.

1026. GRIFFITHS v. SMITH, 1 Ves. Jun. 97.

Denied in Colhoun v. Thompson, 2 Moll. 287. "When he reported Ld. Thurlow's cases, Mr. Vesey was a very young man."

1027. GRIFFITHS v. WILLIAMS, 1 D. & E. 710.

Money paid into Court; but plaintiff proceeded to trial, and had a verdict for the exact sum paid in. The court directed costs for plaintiff up to the time the money was paid in. But Buller, J., in Stevenson v. Yorke, said, (4 Term, 10,) that this part of the case could not be supported.

1028. GRIM v. PHŒNIX INS. CO., 13 John. R. 451. (1816.)

A loss occasioned by fire, and imputable to the negligence of the master or mariners, is not a loss within the policy.

Oppo. Busk v. The Royal Exc. Assu. Co., 2 B. & Ald. 73, and Walker v. Maitland, 5 ib. 171; Petapsco Ins. Co. v. Coulter, 3 Pet. R. 222; Waters v. The Merchants' Lou. Ins. Co., 11 ib. 213.

1029. GRIMSTONE'S CASE, Ambler, 706.

Doubted in Weed v. Tew, 1 Beat. 276.

1030. GRINNELL v. PHILLIPS, 1 Mass. 541, S. P. Smith v. Cheetham, 3 Caines R. 57.

Which adopted the former practice in England and in this country of admitting jurors to testify in regard to their own misbehavior.

Overruled by Ld. Mansfield in Vaise v. Delaval, 1 Term R. 11; Dorr v. Fenno, 12 Pick. 525, and 2 Greenl. 41, note, in which all the authorities are collected.

1031. GRISWOLD v. PENNIMAN, 2 Conn. R. 564.

Held, that the administrators of a husband who died in the life time of his wife were entitled to the wife's distributive share of her father's personal estate who died in the life time of the husband.

Denied in Wintercast et al. v. Smith, 4 Rawle, 179.

1032. GRISWOLD v. STEWART, 4 Cowen, 457.

In a *scire facias* against Stewart as terre-tenant upon a judgment by default at a term which commenced after the death of the defendant; held, that the terre-tenant might show it by the plea and thereby avoid the judgment.

Denied in Warder v. Tainter, 4 Watts' R. 279, *et seq.*—Kennedy, J. Vid Randall & Wife and Haydock v. Cobb, (post).

1033. GRONING v. MENDHAM, 1 Stark. R. 257.

In action for the price of clover seed sold by sample, held, that before defendant could show that the seed did not correspond with the sample, he must prove that he had given the plaintiff notice of the variation.

Shaken in Poulton v. Lattimore, 9 B. & C. 259—Bayley, B. in Allen v. Cameron, 3 Tyrw. R. 907; Chappel v. Hicks, 4 Tyrw. R. 43.

1034. GROVE v. DUBOIS, 1 T. R. 112.

Overruled in Morris v. Cleasby, 4 M. & S. 566; See Gall v. Comber, 7 Taunt. 558; Baker v. Langhorn, 6 ib. 519.

1035. GROWSOCK v. SMITH, 3 Anstr. 877; per M'Donald, C. B.

Overruled. Baxter v. Lewis, Forrest. 61; vid. Webb v. Bettel, per Windham, J. acc. 1 Lev. 44; Martin v. Smith, 2 Smith's Rep. 543.

1036. GUERARD v. RIVERS, 1 Bay's R. 265.

S. P. as in Liber v. Parsons, (post.)
Witherspoon v. M'Calla, 3 Dess. Eq. R. 245.
S. P. as in Liber v. Parsons, (post.)

1037. GUERNSEY v. CARVER, 8 Wend. 492.

That a running account for goods sold, money paid, &c. is an entire demand, incapable of being split up for the purpose of bringing suits.

Denied in Badger v. Titcomb, 15 Pick. 415; Wilde, J. :—"It cannot be maintained that a running account for goods sold and delivered, money loaned, or money had and received, at different times, will constitute an entire demand, unless there is some agreement to that effect, or some usage or course of dealing, from which such an agreement or understanding may be inferred."

1038. GUTH v. GUTH, 3 Bro. Ch. Ca. 614.

Overruled, in effect, in Legard v. Johnson, 3 Ves. 352; St. John v. St. John, 11 Ves. 526, so far as it decided that a *feme covert* might, in equity, sue her husband in a contract for separate maintenance, where there was no intervention of a trustee.

1039. GUTHERIDGE v. SMITH, 2 H. Bl. 377.

Mr. J. Heath in speaking of the effect of paying money into court:—"Coming in lieu of a tender, it has all the effect which a tender would have had, and it is clear that after a tender the plaintiff cannot be non-suit."

Denied in Anderson v. Shaw, 3 Bing. 290, by Ch. J. Best.

1040. GUTHRIE v. FISKE, 3 B. & C. 178.

Oppo. Williams v. Beaumont, 10 Bing. 260:—Held, that a private act which directed that the chairman might sue in behalf of the company "for recovering any debts, or enforcing any claims or demands," entitled him to sue for a libel on the company.

1041. GWINNE v. POOLE, 2 Lutw. 935.

Trespass of assault, &c. and justification under process of an inferior Court, where the now deft. was plf. and held that he need not set forth that the cause of action arose within the jurisdiction, &c.

Denied in Moravia v. Sloper, Willes, 34.

1042. HACKLEY v. PATRICK et al., 3 John. 528; and Walden v. Sherburne, 15 ib. 424.

It seems to have been held that the acknowledgment of one partner, after a dissolution will not bind his copartners, or at least that it is not conclusive.

Denied in Parker v. Merrill et al., 6 Greenl. 41; Martin v. Root et al., 17 Mass. 227.

1043. HAGGERTY v. PALMER, 6 J. Ch. R. 437.

Denied in Chapman v. Lathrop, 6 Cow. 115, n. (a) where it is said,—"The marginal note in Palmer v. Hand, 13 John. R. 434 is erroneous. That note with the subsequent decision in Haggerty v. Palmer, 6 J. Ch. 437, decided by Kent, late Chancellor, have led the profession generally, to an adoption of the doctrine as stated in Mr. Johnson's marginal note to Palmer v. Hand."

1044. HALE'S HIST. OF THE COMMON LAW.

'This book was published from a posthumous manuscript of the learned judge, and is exceedingly cursory and defective.' Bart. Elements—Stud. of Convey. 1 Vol. p. 15.

1045. HALE'S HIST. PLAC. COR. 556.

Where it is said that if A. hire a chamber in the house of B. &c. it is burglary to break it open; and the indictment shall make it *domum mansionalem* of B.

This *dictum* is considered and overruled in Lee v. Gansel, Cowp. 1.

1046. HALL v. HARDY, 3 P. Wms. 189.

If the husband for valuable consideration covenant that his wife shall join him in a fine, the court will decree a performance.

Overruled in Howell v. George, 1 Mad. R. 15; see Griffin v. Taylor, (ante,) and 2 K. C. 168.

1047. HALL v. LAWRENCE, 4 D. & E. 589.

That the award of an umpire shall not be set aside, because he received the evidence from the arbitrators without examining the witnesses, unless he were requested to examine them before making his award.

Denied in Falconer v. Montgomery, 4 Dall. 232; and in Passmore v. Pettit, 2 Dall. 271; Kyd on Awards, 104. note.

1048. HALL v. MALTBY, 6 Price, R. 240. 258, 259.

Held, that where a fact is charged, and put in issue in a bill, the examination of witnesses to the confessions, conversations and admissions of the defendant, are not admissible to prove the fact, unless such confessions, conversations and admissions, are expressly charged in the bill, as evidence of such fact.

Overruled in Smith v. Burnham, 2 Sumner's R. 613.

1049. HALSEY'S CASE, 2 Ro. Ab. 81; Latch. 183, S. C.

Doubted by Mr. J. Dennison, Say. R. 302:—"Halsey's case, according to the report of 2 Roll. Abr. 81, is too nice, as to the necessity of precision in setting out the length and breadth of the nuisance in an indictment: in another report of the same case, Latch, 183, no notice is taken of the precision mentioned by Rolle."

1050. HALLETT v. NOVION, 14 John. R. 273.

Reversed in Novion v. Hallett, 16 John. R. 327: Held, that the common law courts of the several states have no jurisdiction in cases of illegal capture on the high seas, as prize of war.

1051. HAMBLING v. LISTER, Amb. 401, cited from Reg. B. 13 Ves. 336.

Overruled in Ashburner v. Macquire, 2 Bro. C. C. 110, and cases cited in Ram on Assets, p. 122. n. (x).

1052. HAMBLY v. TROTT, Cowp. R.

Denied in M'Kinnie's Ex. v. Oliphant's Ex., 1 Hayw. R. 4—Williams, J. :—" The case of Hambly and Trott, in Cowper, is not law; and further, I never knew a case in Cowper to be received as law in our courts."

1053. HAMERSLY v. LAMBERT, 2 John. Ch. R. 508.

" No period has been fixed within which a creditor, by not making a demand upon a surviving partner, should be held to have waived his equity against the estate of a deceased partner."

Denied in Executors of Fisher v. Executors of Tucker, 1 M'C. Ch. R. 173.

1054. HAMILTON'S LESSEE v. SWEARINGTON, Add. R. 48.

Parol evidence was offered to supply the place of a lost deed, but the Court refused to receive it.

Denied in Jackson v. Cullum, 2 Blackford's R. 229 ; Hilts v. Frier, 16 John. 182.

1055. HAMMATT v. WYMAN et al., 9 Mass. 138.

Held, that a purchaser at sheriff's sale in order to prove title to goods, must show a legal return of the execution.

Denied in Whiting v. Bradley, 2 N. H. R. 82.

1056. HAMMERLIN or (HAMERTON) v. STEAD, 3 B. & C. 478.

Tenant from year to year, during a current year, entered into an agreement, for a lease to be granted to him and A. B. ; and from that time A. B. entered and occupied jointly with him : Held, that by this agreement and the joint occupation under it, the former tenancy was determined, although the lease contracted for was never granted. Bayley, J. said—" If a sole tenant agrees to occupy, and does occupy jointly with another, that puts an end to the former sole tenancy."

Oppo. Schieffelin v. Carpenter, 15 Wend. 400. Nelson, J. in reference to Hamerton v. Stead :—" The judges were somewhat embarrassed to place the case upon principle, and some of their observations conflict with the case in 6 East, 86, which they admitted to be good law."

1057. HAMILTON v. RUSSELL, 1 Cranch, 316.

S. P. as in Edwards v. Harben.

1058. HAMMOND v. ATWOOD, 3 Mad. 150.

Overruled. See Brebner v. Thompson, 2 Moll. Ch. R. 433.

1059. HANFIELD v. M'NAIR, 9 Wend. 56.—S. P. 76.

The Ch. J. after asserting the doctrine of the case Striglitz v. Eg-

gitton, 1 Holt, 141, that an attorney who executes a sealed instrument must have an authority under seal, concludes by saying, that no subsequent acknowledgment will do.

Denied in Blood v. Goodrich, 12 Wend. 527, 8; "The Ch. J., no doubt, intended to say that no subsequent acknowledgment by *parol* could supersede the necessity of an authority under seal: he did not intend to say that a *parol acknowledgment of the existence of an authority under seal*, could not be admitted."

1060. HANSARD v. ROBINSON, 7 B. & C. 90.

The indorsee of a bill having lost it cannot in an action at law recover the amount from the acceptor, although the loss was after the bill became due, and the indorsee offered an indemnity. He may tender sufficient indemnity, and then may enforce payment in equity.

Oppo. Swift v. Stevens, 8 Conn. 431. The holder only required to prove that defendant cannot afterwards be called on to pay it. But it was *said* in Hinsdale v. The Bank of Orange, 6 Wend. 378, 'if the owner *loses* a bill he cannot recover; but if he can prove it actually destroyed, he may.'

1061. HARDING v. DAVIS, 2 C. & P. 77.

Held, that an offer by a third person to go up stairs and get the sum which defendant said she was willing to pay the plaintiff, and the plaintiff replied, that she need not trouble herself, for he could not take it, was held sufficient proof to sustain a plea of tender for that sum.

Overruled in Dunham v. Jackson, 6 Wend. 22, 33; Breed v. Hurd, 6 Pick. 356. But see 2 Phill. Ev. 134, and cases cited in the text and *in notis*.

1062. HARDING v. SPICER, 1 Campb. 327,—Heath.

S. P. as in Gutteridge v. Smith, (ante).

1063. HARDMAN v. CLEGG, Holt, N. P. C. 657.

Overruled in Tooth v. Bagwell, 11 J. B. Moore, 349; S. C. 3 Bing. 446; Spires v. Morris, 3 Moore & Scott, 118.

1064. HARDWICKE'S CASE, Nott. Lent Ass. 1811; 1 Phill. Ev. 105.

S. P. as in Row's case.

Doubted in Dunn's case, 4 C. & P. 543.

1065. HARMAN v. VAN HATTON, 2 Vern. 717.

Admits the legality of a wager policy. Vid. Amory v. Gilman, 2 Mass. 1. contra.

1066. HARNING v. CASTOR, 1 Rep. in Chanc.—briefly stated in the argument of the Earl of Oxford's case, for point, see 3 Co. &c.

Denied in Flint v. Sheldon, 13 Mass. 452; Jackson, J.:—"This report gives no more than is stated in Viner. (Abr. Usury, pl. 3, 4.) It is not law, and it has been repeatedly overruled."

1067. HARPER v. BUTLER, 2 Pet. R. 239.

An executor in Kentucky may assign a chose in action, so that the assignee may sue in his own name in Mississippi.

Oppo. Stearns v. Burnham, 5 Greenl. R. 261; Thompson v. Wilson, 2 N. H. R. 291.

1068. HARRINGTON v. M'MORRIS, 5 Taunt. R. 233.

Ch. J. Mansfield said, 'that the defendant's language in one plea cannot be used to disprove another plea.'

Denied in Alderman v. French, 1 Pick. 1; Jackson, J. as applicable to an action of slander; and held, that the special plea of justification was competent, and legal evidence on the trial of the general issue to prove the speaking of the words.

1069. HARRIS v. BENSON, 2 Str. 910.

Held, that the drawer of an inland bill of exchange was not chargeable with interest for want of a protest.

Overruled in Windle v. Andrews, 2 B. & Ald. 696.

1070. HARRIS v. CLAP, 1 Mass. R. 308.

Where the penalty in a bond is not in the nature of stated and ascertained damages, the injured party may recover beyond the penalty, and against a surety.

Denied in Clark v. Bush, 3 Cow. 151. See 9 Cranch, 104, 120; 1 Gall. R. 348, S. C.

1071. HARRIS v. EVANS, 1 Wils. 262.

Lease for one whole year, and so for 2 or 3 years, or any such further term of years as the parties should think fit and agree: adjudged to be a lease for two years.

But Ambler, who was of counsel in the cause, says it was holden to be a lease for one year only, without a subsequent agreement. Ambl. 329.

1072. HARRIS v. HICKS, Salk. 458; and in all the English books.

That a marriage between a man and the sister of his deceased wife is invalid.

Denied, generally, in this country; and in Greenwood v. Curtis, 6 Mass. R. 378.

1073. HARRISON v. DAVIS, 5 Burr. 2683.

Denied in Stockton v. Throgmorton, 1 Baldwin's R. 148, 151, so far as respects the rule, "supposed to be laid down by Lord Mansfield in the case of Harrison v. Davis, that bail must be put in, *and perfected.*— Lord Mansfield's words are 'putting in bail,' the words '*and perfecting*,' is a gratuitous interpolation by elementary writers, adopted in some later cases, and thus misleading the judge."

1074. HARRISON v. JACKSON, 7 T. R. 207. See Striglitz v. Eggington, Holt's R. 141.

An authority under seal is necessary to be produced, where one party has executed a deed for himself and his co-partners.

Denied in Fichthorn v. Boyer, 5 Watts, 159; Hart v. Withers, 1 Penn. R. 285.

1075. HARR. CHAN. PRAC., 294.

If a bill against husband and wife show an interest in the husband, but none in the wife; and both join in a general demurrer, if it is not sustained as to him; it must also be overruled as to her.

Denied in *Crane* v. *Deming*, 7 Conn. R. 393; by Williams, J. who says:—'according to *Ld. Redesdale, it is generally considered*, that being entire, it must be overruled.' This is nothing more, then, that when a party has a good case,—but in his bill has intermixed claims not defensible,—though a demurrer to those parts of the bill would be sustained, yet a demurrer to the whole bill would not be.'

She must answer with her husband, unless the court grant leave for a separate answer. 2 Madd. 218. The demurrer was sustained as it respects Mrs. D.

1076. HART v. THE DELAWARE INS. CO., Cited Marsh. Insu. (Cond. ed. p. 281.)

Doubted in Peel v. Merchant's Ins. Co., 3 Mason, 62.

1077. HART v. HORN, 2 Camp. 92.

Heath, J. held, that the declarations of a person under whom the defendant made cognizance in replevin were not evidence against him, and in favor of the plaintiff.

Denied in Harrison v. Vallance, 7 Moore, 304; 1 Bing. 45. S. C.; Titus v. Myers, 11 Wend. 537.

1078. HART v. KING, 12 Mod. 310; Holt, 118.

Shaken in Ex parte Greenway, 6 Ves. Jr. 812; Pierson v. Hutchinson, 2 Campb. 211; Dangerfield v. Wilby, 4 Esp. 159.

1079. HART v. TEN EYCK, 2 J. Ch. R. 62.

Reversed. See Woodcock v. Bennet, 1 Cowen, 744, note (a).

1080. HARTLEY & al. v. ATKINSON, 2 Barnes, 255.

That where a nonsuit is regular, the parties are out of Court, and it cannot be set aside.

Overruled in Sadler v. Evans, 4 Burr. 1984.

1081. HARTLEY v. CASE, 4 B. & C. 339.

A notice of the dishonor of a bill of exchange must contain an intimation that payment of the bill had been refused by the acceptor; a letter merely containing a demand of payment was not a sufficient notice.

Doubted. Lord Brougham, C. in Solarte v. Palmer, 1 Bing. N. C. 194, said—'The judgment must be affirmed, on the ground that after the decision of *Hartley* v. *Case*, and the sanction given to the authority of that decision by the unanimous judgment of the Court of Exc. Ch. and the 5th ed. Bayley on Bills.'

1082. HARTLEY v. HURLE, 5 Ves. 540.

Overruled in Tyler v. Lake, 1 Clarke & F. 144:—Held, that "if the bequest be to a married woman '*for her own use and benefit*,' without adding the words '*and at her own disposal*,' especially if there be bequests to men by the same words, the wife does not take a *separate* interest, but her husband is entitled."

1083. HARTLEY v. WILKINSON, 4 Camp. 127; 4 M. & S. 25; Chit. on B. 60.

An indorsement on the back of a promissory note is considered as part of the note itself.

Oppo. Sanders & Ogden v. Bacon, 8 J. R. 485, and Tappan v. Ely, 15 Wend. 363.

1084. HARTNESS v. THOMPSON, 5 Johns. 160; Woodward v. Newhall, 1 Pick. 500; 1 Wils. 89.

Held, that where two joint defendants are sued on contract; and one sets up infancy in defence, plaintiff may enter a *nolle prosequi* as to the infant, and proceed against the other defendant.

Oppo. Chandler v. Dunks, 3 Esp. 76; Burgess v. Merrill, 4 Taunt. 468; Jaffray v. Frebain, 5 ib. 47.

1085. HARVEY v. ASTON, 1 Atk. 163, 361, 375.

Denied by Ld. Eldon in Clarke v. Parker, 19 Ves. 24, as to the opinion said to have fallen from Ld. Ch. Baron Comyns.—"I may venture to say he expressed no such dictum,"—'that the consent of the majority of the trustees to the marriage is sufficient:'—"I have seen a manuscript note, in which the Ch. Baron says no such thing."

1086. HARVEY v. HARVEY, 1 P. Will. 125; Burton v. Piermont, 2 ib. 79; Peacock v. Monk, 2 Ves. 190.

The property of the wife, of which she was to have the use independent of her husband, should be vested in trustees.

Oppo. 2 Story Eq. 607, and cases cited. "The intervention of trustees is not indispensable."

1087. HATCH v. DWIGHT, 17 Mass. R. 289.

That the first occupant of a mill seat has a right to sufficient water to work his wheels, even if it should render useless the privilege above or below.

Oppo. in Omelvany v. Jaggers, 2 Hill's R. 634. It was there said, also Platt v. Root, 15 Johns. 213; Palmer v. Mulligan, 3 Caine, 307; 3 K. C. 353.

1088. HATCH v. MANN, 9 Wend. 262.

Reversed in Hatch v. Mann, 15 Wend. 44.

1089. HAUER v. SHEETZ, 3 Yeates, 205.

Reversed in S. C. 2 Binn. 532.

1090. HAVEN v. RICHARDSON, 5 N. H. R. 113.

An assignment to certain specified creditors with a stipulation in the deed for a release of the debts of such as become parties thereto; and with a reservation of the surplus; *held*, not conclusive evidence of fraud.

Denied in 2 Kent C. 534, n. (a): "The reservation would now, generally, and it seems to be every where fatal to the instrument."

1091. HAWES v. SMITH, 1 Vent. 268; 2 Lev. 122.

Overruled in Secar v. Atkinson, 1 H. Bl. 104.

1092. HAWKE v. BACON, 2 Taunt. 156. 160.

Overruled in Tapley v. Wainwright, 5 B. & Adol. 395; 2 N. & M. 697, as to the dictum of the court.

1093. HAWKES & ux. v. SAUNDERS, Cowp. R. 289; S. P. as in Atkins v. Hill, (ante).

Shaken, if not overruled, in Dicks v. Street, 5 T. R. 690; Sleighter v. Harrington, 2 Murph. R. 354.—Hall, J.

1094. HAWKINS v. OBYN, 2 Atk. 549, 551.

S. P. as in Grey v. Kentish, (ante).

1095. HAWK. P. C., b. 1. c. 74, s. 1.

That solicitation of chastity, is not indictable.

Doubted. The State v. Avery, 7 Conn. 267.

1096. HAWKINS v. RUTT, Peake's C. 180.

Where the creditor directs the mode of remittance by post, delivery to a bellman in the street is not a sufficient putting into the post.

Doubted in Smith's Mer. Law, (Law Lib. Ph. ed. p. 190.)

1097. HAYDOCK v. COBB, 5 Day's R. 527.

That a stranger to the judgment or decree, though no right that he had was affected by it, might invalidate it in a collateral suit, by showing that it was passed against a person who was dead at the time.

Denied in Warder v. Tainter, 4 Watts' R. 279.

1098. HAYES v. WARREN, 2 Stra. 933.

That assumpsit will not lie for a past consideration, unless it was at the request of the party.

Denied per Wilmot, J. in Pillans & al. v. Van Meirop & al., 3 Burr. 1671.

1099. HAYMAN v. GERRARD, 1 Saund. 102; 1 Sid. 340.

Overruled. Meredith v. Allen, Carth. 116; 1 Show. 148; 1 Salk. 138; Holt, 544.

1100. HAYMAN v. NEALE, 2 Camp. R. 337.—Ellenborough.

Held, that after the broker had entered the contract in his book, neither party could recede from it.

Overruled in Goom v. Affalo, 6 B. & C. 117, and Thornton v. Meux, 1 M. & M. 43. See also 2 Phil. Ev. 99.

1101. HAYWARD v. BLAKE, 12 Mass. 176.

Merely having on board of the ship an enemy's license, will not avoid the policy.

Oppo. Colquhoun v. N. Y. F. Ins. Co., 15 J. R. 352 and cases cited.

1102. HAYWARD v. HAGUE, 4 Esp. R. 93—Lawrence.

A *letter* written by the plaintiff's attorney demanding payment of a debt, sent to the defendant's house, and to which an answer is returned, that the demand should be settled, is sufficient evidence on the issue of a subsequent demand and refusal.

Oppo. Edwards v. Yeates, Ry. & Mo. 360—Abbott.

1103. HAYWOOD v. LOMAX, 1 Vernon, 24; Bacon v. Brown, 1 Bibb's R. 334; Ld. Holt, in Anon. Comb. R. 463 (in 1697) (1 Domat, b. 4, tit. 1, s. 4, art. 2, 3.)

Where an indefinite payment is made by the debtor, it should be applied most beneficially for him.

Oppo. Manning v. Western, 2 Vern. 607, n. (1) (1707).—Held, that where the payment was general, the appropriation belongs to the creditor;—and the latter might apply it as most for his benefit,—as upon a simple contract debt, not drawing interest. Followed in Field v. Holland, 6 Cranch, 27; Blanton v. Rice, 5 Monro's R. 253—except in the latter case, the court thought the application must be to the debt drawing interest. Baker v. Stackpoole, 9 Cowen, 435; Mayor of Alexandria v. Patten, 4 Cranch, 320.

1104. HEARD v. WADHAM, 1 East, 627.

A *dictum* of Ld. Kenyon, interrupting Abbott. Not law. Vide ante, Growsock v. Smith, and authorities there.

1105. HEAD v. EGERTON, 3 P. Wms. 280.

If the mortgagee of an estate has allowed the vendor to retain the title deeds, and thus to commit a fraud upon an innocent party, he cannot afterwards recover them by action.

Distinguished in Harrington v. Price, 3 B. & Ad. 170; Head v. Egerton, was the case of a mortgage, and a mortgagor generally remains in possession of the estate; it is different with a vendor; whoever is entitled to the land has also a right to all the title deeds affecting it.

1106. HEARD v. STANFORD, 3 P. Wms. 409; *Cases Temp.* Talb. 173.

Explained by Ld. Redesdale in 1 Sch. & Lef. 263.

1107. HEARN v. ALLEN, Cro. Car. 57; Hut. 85.

Holt, C. J. "was of opinion that the authority of this case was not great." Nottingham v. Jennings, 1 Com. Rep. 82.

So thought Willes, C. J. in Goodridge v. Goodridge, Willes, 370.

1108. HEARN v. TOMLIN, Peake's N. P. R. 192.

Occupation under an agreement to purchase the premises:—Ld. Kenyon seems to assume that the action would lie, though he nonsuited plaintiff, but because the occupation, instead of being beneficial, was injurious to the defendant.

Denied in Smith v. Stewart, 6 John. R. 49; Banckroft v. Wardell, 13 ib. 489.

1109. HEATH v. HENLY, 1 Ch. Cas. 20.

Denied in Trecothick v. Austin, 4 Mason, 31—Story, J.; and in Murry v. Coster, 20 J. R. 576—Spencer.

1110. HEATH v. SAMPSON, 2 B. & Adol. 291.

Held, that in all cases where, from defect of consideration, the origi-

nal payee could not recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove a *bona fide* consideration given by himself or a prior indorsee.

Overruled in New-York in Morton v. Rogers, 14 Wend. 575; and *it seems* in England also. Whitaker v. Edmunds, 1 Moo. & Rob. R. 366. Branch v. Roberts, 1 Bing. R. N. S. 465; Lowe v. Clifney, 5 M. & Scott, 95; 2 Dowl. Pr. R. 130. 252.

1111. HEATHCOTE v. PAIGON, 2 Bro. Ch. Ca. 167.

Disapproved of in McGhee v. Morgan, 2 Sch. & Lefr. 395, note.

1112. HELLINGS v. SHAW, 7 Taunt. R. 608.

Ch. J. Gibbs, said—"Where the defendant has stated, not that the debt remained due, but that it was discharged by a particular means, to which he has with precision referred himself, and where he has designated the time and mode so strictly, that the court can say it is impossible it had been discharged in any other mode. There the Court have said, if the plaintiff can disprove that mode, he lets himself in to recover, by striking from under the defendant the only ground on which he professes to rely."

Doubted in Beale v. Nind, 4 B. & Ald. 568.—Bayley, J. and in Oliver v. Gray, 1 Maryland R. 219.—Buchanan, Ch. J. But see 1 B. Moore, 344, where the case of Hellings v. Shaw, is reported differently: Gibbs, C. J. there confines his observation to a written instrument. See also 2 Phil. Ev. 189; Brydges v. Plumptre, 7 D. & Ry. 746.—Littledale. "I cannot say that his saying, whether true or false, that he has a receipt in full of all demands is to be construed into an admission of his liability."

1113. HEMENWAY v. HICKS, 4 Pick. 497.

Denied in Rowell v. Bruce, 5 N. H. R. 385: Held, that a material allegation in a declaration cannot be supplied by amendment after verdict.

1114. HENBEST v. BROWN, Peake's N. P. Ca. 54.

Ld. Kenyon's opinion, that the statutes of bankruptcy extended to *all debts*, as well as *written securities*, payable at a future date, is controverted by Ld. Ellenborough, in Parslow v. Dearlove, 4 East, 438.

1115. HENCH v. METZER, 6 S. & R. 272.

Trover abates by the death of the defendant.

Doubted in Keite v. Boyd, 16 S. & R. 301: Held, that replevin does not abate by the death of the defendant.

1116. HENDRICKS v. FRANKLIN, 4 J. R. 119.

That the holder of a bill of exchange drawn in N. Y. on Great Britain, and returned protested for non-payment, can recover no more than the contents of the bill, and 20 per cent. damages, with interest, or at the par of exchange. He can recover nothing for the difference in the price of bills between the time it was returned and the time the bill was drawn.

Overruled in Dash v. Graves, 12 ib. 17.

1117. HENDRICKS v. JUDAH, 1 J. R. 319; O'Callighan v. Sawyer, 5 J. R. 118; Bank of Niagara v. M'Cracken, 18 J. R. 493; Ford v. Stuart, 19 J. R. 342.

The principle seems to be assumed, that as between the original parties, a set-off is a *defence to a negotiable promissory note;* and therefore, must be permitted to be made after the transfer, if endorsed after due.

Denied in Burrough v. Moss et al., 10 Barn. & Cr. 558; Robinson v. Lyman, 10 Conn. 30; Holland v. Makepeace, 8 Mass. 418; Bridge v. Johnson, 5 Wend. 342.

1118. HENLY v. BROAD, 1 Lev. 41.

Denied in Rose v. Oliver, 2 John. 368, Spencer, J.:—"Serjeant Williams in his notes (1 Saund. 291 (d) note), after noticing the case of Henly v. Broad, and several other cases, which recognize the principle, that if the plaintiff show that the *tort* was done jointly by the defendant and A. B., the suit shall abate, says that there is no good ground for the distinction."

1119. HENMAN v. DICKINSON, 5 Bing. 183.

That if an alteration appears upon the face of a bill, the party producing it, must show that the alteration was not improperly made.

Denied in Bailey v. Taylor, 11 Conn. 531, 538, *et seq.*—Williams, C. J., who cites Taylor v. Mosely, 6 C. & P. 273, as not recognizing Henman v. Dickinson as law.

1120. HENNEL v. LYON, 1 B. & A. 182.

Doubted in Rees d. Howell v. Bowen, 1 M. & Y. 383—Garrow, B. See also Highfield v. Peake, 1 Mo. & M. 109.

1121. HENNINGS v. ROTHSCHILD, 4 Bing. 315; 12 Moore, 559.

Overruled in Rothschild v. Hennings, 9 B. & C. 470.

1122. HENRY v. LEE, 2 Chit. R. 124.

A witness on the trial of a cause may refresh his memory from a document, though not written by himself; Lord Ellenborough saying; 'and if upon looking at any document he can so far refresh his memo-

ry as to recollect a circumstance, it is sufficient; and it makes no difference that the memorandum was written by himself, for it is not the memorandum that is the evidence, but the recollection of the witness.'

Denied in Meagoe v. Simmons, 3 C. & P. 75; M. & M. 121—Tenterden.

1123. *HENRY* v. *MORGAN*, 2 Binn. R. 497.

S. P. as in *Fotheringam* v. *Greenwood*—(ante.)

Oppo. In *Plumb* v. *Whiting*, 4 Mass. 518. Parsons, C. J.—makes a distinction thus—'If a witness would testify under the impression of an interest, which he honestly believes he has in the event of the suit, he cannot be sworn: for the effect on his mind must be the same, whether his interest arises from a legal contract, or from a gratuitous promise, on which he confidently relies.'—Thus where a minor son was offered as a witness by the father in an action for the son's work, after having himself proved by a witness that his son was to have *one half of the money;* and it being objected that the promise was voluntary and could not be enforced at law;—Parsons, C. J. said, 'that it did not lie with the plaintiff to say that the witness he produced does not confide in the promise, which the plaintiff himself has made to him; the plaintiff cannot impeach the credit of his own witness.'

1124. HENRY v. RISK, 1 Dall. 265.

That interest was not payable for goods sold and delivered.

Overruled in Crawford v. Willing, 4 Dall. 286. 289. n. (2).

1125. HENRY v. The Ship JOHN & ALICE, 1 Wash. Cir. R. 293.

Denied in The Brig Draco, 2 Sumner, 179—Story: "That case cannot stand, unless upon the ground, that a Bottomry bond given by an owner, in a foreign port, is not cognizable in the Admiralty; a doctrine, which is inconsistent with what I cannot but now think to be an established doctrine in our Admiralty Courts:" See the case of Barbara, 4 Rob. R. 1.

1126. 33 HEN. 1. 46. pl. 30. (or, 33 H. 6).

S. P. as in Holcomb v. Rawlins, (post).

Overruled in 13 H. 7, 15 pl. 11; See Putnam J., in 2 Pick. 496; *et seq.*

1127. HENSHAW v. PLEASANCE, 2 Black. 1174.

Denied in Hume v. Burton, 1 Ridg. Par. Ca. 43, 44 n. (d).

1128. HEPPEL v. KING, 7 D. & E. 372.

Lawrence, J. observed, that there was an inaccuracy in the wording of this report, in what he is made to say of the *recognizance* of the bail be-

low. Bail below do not enter into recognizance, but give *bond* to the sheriff. 3 East, 606, note.

1129. HERLAKENDEN'S CASE, 4 Rep. 62.

Trespass qu. cl. and plea as to *part* only, to which the plaintiff demurred; and it was holden to be a discontinuance.

"This is certainly not law." Per Willes, C. J. in Bullythorpe v. Turner, Willes, 480.

1130. HERMAN v. DRINKWATER, 1 Greenl. R. 27.

In trover against a shipmaster for breaking open a trunk and converting the contents to his own use, the owner was permitted to prove the contents and the value; 'he not having it in his power to establish the fact by other proof.'

Doubted in Amer. Jurist, 8 Vol. 35, (July 1832).

1131. HERNE v. BEMBOW, 4 Taunt. R. 764.

S. P. as in Gibson v. Wells, (ante).

1132. HETHERINGTON v. REYNOLDS, 1 Salk. 8.

If a *feme sole* be sued in an inferior court, and after plea marries and removes the cause, by *habeas corpus*, she may plead coverture in abatement to the new declaration above.

Overruled in Haddock v. Hazard, Barnes, 355, (acc. Vosburgh v. Rogers, 8 J. R. 95.)

1133. HIGGINS, 6 Co. R. 45, and Broome & Woodton, Cro. Jac. 73; S. C. Yelv. 68.

Doubted in Lechmere v. Fletcher, 1 Cr. & Meeson R. 623—Bayley. In U. States v. Cushman, 2 Sumn. R. 426—Story.

1134. HIGGINS v. LIVERMORE, 14 Mass. R. 106.

The phrase, "Swedish Brig Sophia," was *held* to amount to a warranty that the vessel was in fact a *Swede*, or *at least that she was regularly documented as such.*

Explained in Lewis v. Thatcher, 15 Mass. R. 431; Parker, C. J. said, 'the qualification of the opinion was unfortunate.'

1135. HIGGINSON et al. v. AIR et al., 1 Desaus. R. 427.

That the assumptions of the surviving partner, as to the affairs of the firm, bound the other partner's estate; and the law had fixed no limitation of time as to the reviving a partnership debt by his acknowledgment.

Overruled in Executors of Fisher v. Executors of Tucker, 1 M'C. Ch. R. 171.

1136. HIGGINSON v. MARTIN, 2 Mod. 195; 1 Freem. 322.

Contradictory reports of this case. See 3 Dougl. R. 48, n. (a).

1137. HANKEY v. TROTMAN, 1 W. Bl. 1.

Denied in Medcalf v. Hall, 3 Dougl. R. 113—Buller:—"The case of Hankey v. Trotman cannot be supported, for, according to the statement, it was not possible for the party to receive the bill sooner."

1138. HIGHAM v. RIDGWAY, 10 East, 109.

"That if a person has peculiar means of knowing a fact, and makes a declaration of that fact which is against his interest, it is clearly evidence of that fact *if he could have been examined to it in his life time.*"

Denied in Gleadow v. Atkins, 3 Tyrw. Exch. R. 302—Bayley.

1139. HILDRETH v. SANDS, 2 J. Ch. R. 35.

Explained by Ch. J. Marshall, in 11 Wheat. R. 90, as to what Ch. Kent says in respect to allowing the deed to stand in favor of an innocent grantee, if the deed is admitted to be fraudulent on the part of the grantor.

1140. HILL v. ATKINSON, 3 Price, 404.

Eldon—That appropriation means payment.

Doubted in Att. Gen. v. Wood, 2 Y. & J. 300—Alexander, L. C. B. in respect to the language found in the report of the case by Mr. Price.

1141. HILL v. BURNHAM, 15 Ves. 227.

Ld. Eldon said:—"There is one proposition, however, which, perhaps, is stated too generally: I have there said, 15 Ves. 227, that an executor has the right to have the value ascertained in the way in which it can be best ascertained—by sale. But," &c.—"I am ready to admit, that there may be circumstances, both in the course of dealing between partners, and after one of the partners is dead, or has ceased to be a partner, which may constitute a case, in which that rule may not be capable of being applied."

1142. HILL v. SHERIFF OF MIDDLESEX, Holt's N. P. R. 217; 7 Taunt. R. 8. S. C.

Oppo. Bowden v. Waltham, 5 B. Moore, 183; 2 Phil. Ev. 378, and *cases cited.*

1143. HILL v. WADE, Cro. Jac. 523.

"Overruled by subsequent cases; which appear to establish it as a general rule, that where the promise is to pay a debt or duty, and the action is brought for the non-payment of it, after it becomes due, no

special averment of request is necessary." Lawes on Pl. in Assump. 190. (234.)

1144. HILL v. WILLIAMS, Barnes, 358, (3d ed.)

The reason why a party cannot take money out of court when he traverses the tender is, that the replication to the tender is a refusal to accept the money.

Overruled in Le Grew v. Cooke, 1 B. & P. 333, 4.

1145. HILL v. YATES, 12 East, 229.

Where the K. B. refused to set aside a verdict although it appeared that the son of one of the jurymen answered to the name of his father, when called on the panel, and actually served as one of the jury, in lieu of his father, though he had never been summoned.

Denied in The People v. Ransom, 7 Wend. 424.

1146. HILLARY v. WALKER, 12 Ves. jr. 266.

Denied in White v. Westmeath, 2 Moll. 177.

1147. HILLIARD v. JENNINGS, 1 Ld. Raym. 505.

Denied in Dallam v. Dallam's Lessee, 7 Har. & J. 246:—"When we look to the same case of Hilliard v. Jennings, in 12 Mod. 276, and in Com. R. 94, where Ld. Holt so far from approving, denied the authority of Soulle & Gerrard. So far only, I presume, as related to the *dictum* about the estate tail."

1148. HILYARD v. SOUTH SEA CO. & KEATE, 2 P. Wms. 77.

As to the effect of a forged letter of attorney to transfer stock.

Oppo. Ashly v. Blackwell, Ambler, 503. See W. & Philadel. T. Co. v. Bush, 1 Harr. (Dela.) R. 47, where it was held, that a purchaser of stock need only look to the title of his vendor *on the books of the company*, and is not affected by previous irregularity in the transfers.

1149. HILLS v. ROSS, 3 Dall. 331.

Iredell & Chase held, that one partner could not enter an appearance for a copartner.

Overruled in Taylor v. Coryell, 12 S. & R. 243, 250.

1150. HINCKLEY v. MACLARENS, 1 My. & Keen, 27.

Overruled in Elmsley v. Young, 2 My. & Keen, 780.

1151. HINDLE v. O'BRIEN, 1 Taunt. 413.

S. P. as in Fitzroy v. Gwillim, (ante, 874.)

1152. HINTON v. HUDSON, Freeman's R. 248. (C. 264.) (ed. 1826.)

The husband is not liable upon contracts of the wife with a stranger, after separation.

Oppo. Rawlins v. Vandyke, 3 Esp. R. 250; held that it was incumbent on the husband to show that the tradesman had notice of the separate maintenance.

1153. HISCOX v. BARRET, Park. Ins. 6 ed. 542. n.

Overruled in Bell v. Ansley, 16 East, 141, and Cohen v. Hannam, 5 Taunt. 101.

1154. HITCHCOCK v. AICKEN, 1 Caines, 460.

That a judgment in a sister state is only *prima facie* evidence of a debt.

The contrary is law in Massachusetts, where nothing is examinable but the jurisdiction of the court rendering the judgment. Bissel v. Briggs, 9 Mass. 462.

1155. HITCHCOCK v. GIDDINGS, 4 Price's R. 135.

Denied by the Chancellor in Bates v. Delavan, 5 Paige's Ch. R. 307, who said that the case must have been decided on the principle of the civil law, that an action of redhibition, to rescind a sale and to compel the vendor to take back the property, and restore the purchase money, could not be brought by the vendee, wherever there was error in the essentials of the agreement, although both parties were ignorant of the defect which rendered the property sold unavailable to the purchaser for the purposes for which it was intended. He adds—"I agree, however, with the learned Commentator on American law, that the weight of authority, both in this state and in England is against this principle so far as a mere failure of title is concerned; and that the vendee who has consummated his agreement by taking a conveyance of the property, must be limited to the rights which he has derived under the covenants therein."

1156. HIXT v. GOATES, 2 Roll. Abr. 703.

Where in covenant on a deed of agreement with a sum liquidated as damages, the jury gave less than the sum, and held good.

But of this case Ld. Mansfield said "it is impossible to support it." Lowe v. Peers, 4 Burr. 2229. It is clearly reported in Cro. Jac. 390.

1157. HODGES v. M'CABE, 3 Hawk's R. 78.

That a wife is not dowable of lands sold after the death of her husband, under a *fi. fa.* tested before.

Overruled in Frost v. Etheridge, 1 Dev. R. 30.

1158. HODGES v. STEWARD, Comb. 104; 1 Salk. 125; 12 Mod. 36; Holt, 115; Horton v. Coggs, 3 Lev. 299.

Overruled in Grant v. Vaughan, 3 Burr. 1516.

1159. HODGES v. WINDHAM, Peake, 39.

No action of trespass for criminal conversation could be brought for an act of adultery after a separation between husband and wife.

Overruled in Chambers v. Caulfield, 6 East, 244; 2 Smith, 356.

1160. HOLBROOK v. PRATT, 1 Mass. 96.

That *quod cum*, in trespass, is bad on general demurrer.

Overruled, in Coffin v. Coffin, 2 Mass. 364.

1161. HODGSON v. LE BRET, 1 Camp. 233.

Is stated to have been an action for goods *sold and delivered.*

Overruled it seems as to the form of action. See Boulter v. Arnot, 3 Tyrwh. 269.

1162. HOLCOMB v. RAWLYNS, Cro. Eliz. 540.

That an action of trespass might be maintained against the lessee or feoffee of a disseisor, where the disseisee re-enters and reduces the possession to himself, notwithstanding the plea of title.

Denied (in Liford's case, 11 Co. 51; and Symons v. Symons, 3 Car. 1; Hetley, 66.) But 2 Rol. Abr. 554, *Tres. per Relation;* Gilb. Ten. 47, 50; Com. Dig. Tresp. B. 2; Bull. N. P. 87; Wilde, J. in Emerson v. Thompson, 2 Pick. 473. 485 *et seq.;* and Putnam, J. in S. C. p. 496, *et seq.* See also 12 Mass. 46; Thompson, J. in 3 Caines' R. 262; (and see Liford's case.) (post).

1163. HOLCROFT v. HEEL, 1 B. & P. 400.

Ch. J. Eyre held a possession of 23 years, without interruption, not as eivdence to a jury from whence they might presume a grant, but as a complete answer, or bar, to an action for disturbing a market, by erecting another.

Denied in Sumner v. Child, 2 Conn. R. 607, 613—Swift.

1164. HOLCROFT'S CASE, Dyer, 240 (b); Stephen v. Oliver, 2 Bro. R. 9; Lush v. Wilkinson, 5 Ves. 384; See Sears v. Rogers, 3 B. & Ad. 362.

That a voluntary conveyance is not fraudulent against creditors within the 13th Eliz., unless the party making was indebted at the time, or nearly so; and indeed Ld. Alvanley has said that to invalidate a settlement made after marriage, by the 13th Eliz. the settlor must be in insolvent circumstances.

Qualified. See B. N. P. 257; "and it would be difficult to contend

that a conveyance proved to be made *with the express intent* to defraud even *future* creditors would not be void as against them, indeed that very point seems involved in Tarback v. Marbury, 2 Vern. 510, and Hungerford v. Earle, 2 Vern. 261. It has been held to make no difference that the debt was contracted, not by the party making the conveyance but by his ancestor from whom he derived the estate, Apharry v. Bodingham, Cro. Eliz. 56; Gooch's case, 4 Rep. 60; and as a fraudulent conveyance by the heir is void, so is one by an executor or administrator of the property of the deceased, and he is chargeable with what he so conveys as assets. Doe v. Fallows, 2 Tyrwh. 460; 2 C. & J. 481. And property fraudulently conveyed by the deceased himself is, in contemplation of law, assets for payment of his debts in the hands of his executors. Shears v. Rogers, 3 B. & Ad. 363. By sec. 3 of st. 13 Eliz., parties to a fraudulent conveyance, bonds, &c., forfeit a year's value of the lands or tenements conveyed, the whole value of the chattels, and the amount of any covenous bond, half to the crown and half to the party grieved; the assignees of an insolvent are *parties grieved* within this section. Butcher v. Harrison, 4 B. & Ad. 129." Smith's L. C. p. 12.

1165. HOLDEN v. JAMES, 11 Mass. 396.

Where the deft. accepted the trust of administrator Dec. 2, 1806. It was said by the Court, p. 400, that the four years, the lapse of which bars an action v. an administrator, expired Dec. 2, 1810.

But this expression was afterwards said to be "inaccurate," the time expiring Dec. 1. Vid. Presbrey v. Williams, 15 Mass. 193.

1166. HOLLIS' CASE, 1 Vent. 345.

S. P. as in Grant v. Bell, (ante.)

1167. HOLLOWAY v. COLLINS, 1 Cas. Ch. 245, and Bilson v. Saunders, Bunb. 240.

Overruled in Dagley v. Tolferry, 1 P. Wms. 285; Morrell v. Dickey, 3 J. Ch. R. 153.

1168. HOLMES v. BLOGG, 8 Taunt. 508.

Ch. J. Gibbs is reported to have held, that in a contract voidable by infant on arriving at age, he must give notice of disaffirmance.

Denied in Thompson v. Lay, 4 Pick. 48: Held, that the promise of an infant cannot be revived so as to sustain an action, unless there be an express confirmation or ratification after he comes of age. See also Ordinary v. Wherry, 1 Bayley's R. 28, and Wheaton v. East, 5 Yerg. R. 41.

1169. HOLMES v. CHADBOURNE, 4 Greenl. R. 10.

Doubted in Kavanagh v. Saunders et al., 8 Greenl. R. 422, in respect to the marginal abstract.

1170. HOLMES v. GORING, 2 Bing. 76.

Held, that whenever a way of necessity ceases, the easement claimed, of necessity becomes extinct.

Doubted by Woolrych (Law of Ways, p. 72) :—" The necessity arises out of the grant, and not out of any state of facts subsequent to the grant."

1171. HOLMES v. REMSEN, 4 J. Ch. R. 460.

Denied by Platt, J. in 20 Johns. R. 227 ; 13 Mass. 313 ; Kirby's R. 313 ; 6 Binn. 353 ; 1 H. & M'H. 236 ; 2 Hay. N. C. 24 ; Const. R. S. C. 283 ; and in Harrison v. Sterry, 5 Cranch, 298, and Ogden v. Saunders, 12 Wheat. 213 ; all in effect affirming that " the bankrupt law of a foreign country is incapable of operating a transfer of property in the U. S." And the Court of Errors in Abraham v. Plestoro, 3 Wen. 538, held, that an assignee under a foreign commission of bankruptcy is not entitled before judgment to an injunction to restrain the bankrupt from receiving from the customhouse here, goods which were in transit (on the high seas) at the time of suing out the commission.

1172. HOLST v. POWNAL & SPENCER, 1 Esp. R. 240.

Ld. Kenyon held, that in order to give the consignee a right to claim by virtue of possession, it should be a possession obtained by the consignees, on the completion of the voyage.

Overruled in Mills v. Ball, 2 B. & P. 461 ; 3 ib. 42.

1173. HOLT v. HOLT, 2 Vern. R. 322.

Plaintiff's father seized in fee of land, articles to pay J. S. £1000 to build an house on the premises, and dies before the house is built. The plaintiff may compel the heir to build it, and his father's executor to pay for it.

Denied in cases cited in 2 Sto. Eq. Com, p. 32 n. (4.) Sed. see Mosely v. Virgin, 3 Ves. Jr. 185, and the observations in 2 Sto. Eq. C, p, 33, 34.

1174. HOLT'S REPORTS.

Said per Lee C. J. to be " a book of no authority." 1 Wills. 15.

1175. HOLWARD v. ANDRE, 1 Bos. & Pul. 32.

That where bail are opposed and rejected, and Deft. surrendered the next day, he may justify new bail, without paying the costs of the former opposition.

Said to have been " very properly overruled." 1 Taunt. 57.

1176. HOMER v. WALLIS, 11 Mass. 308.

Held, that the hand-writing of the obligor to a promissory note might

be proved, if the subscribing witness was out of the state, without proving the hand-writing of the subscribing witness.

Denied in Ingram v. Plasket, 3 Blackf. R. 450, 456—(Doe v. Durnford, 2 M. & S. 62, Higgs v. Dixon, 2 Stark. R. 180.)

1177. HONITON v. ST. MARY-AXE, 2 Salk. 535.

Overruled. Rex. v. Inhab'ts of Lubbenham, 4 D. & E. 251; Holt, 578. acc.

1178. HONNER v. MORTON, 3 Russel, 298.

S. P. as in Hornsby v. Lee. (post.)

1179. HOOK, (LADY) v. GROVE, 5 Vin. Abr. 293, pl. 40; 4 Bro. P. C. by Toml. 593.

Sug. on Pow. p. 313. n. (y) says, "Viner states it inaccurately"—'In Bro. P. C. is probably by mistake called her *original* jointure; it was her only jointure.'

1180. HOOKER v. HOOKER, 2 Barn. 200, 203.

Doubted in Park on Dower, p. 66, *et seq.*

1181. HOOPER v. PERLEY, 11 Mass. R. 545.

"The general rule, as to wages of seamen, which has been for many years recognized and uniformly adopted in our courts, is, that if a ship has earned one or more freights, and is afterwards lost before completing the voyage for which the seaman was hired, he is entitled to his wages up to the last port of delivery, and for the half the time that the ship lies in port."

Denied in Bronde v. Haven, 1 Gilpin, 606; as not supported by the English authorities cited.

1182. HOPEFUL TYLER, CONSUL v. JOHN WHITE, cited 2 Sum. R. 422.

Doubted in Parsons v. Hunter, 2 Sum. R. 422, 423.

1183. HOPE'S CASE, 1 Moo. & Rob. 396. (n.)

Where Vaughan & Patteson, J.'s admitted the examination of a prisoner, without calling either the magistrate or his clerk to prove it; an attesting witness was called to prove it.

Opposing decision in Roscoe Cr. Ev. p. 4, (Am. ed.) Denman, C. J. Richard's case.

1184. HOPKINS v. LEE, 6 Wheat. R. 109.

That if the vendor fail to convey according to his contract, the measure of damages is the value of the land at the time of the breach, and not the price fixed in the contract.

Doubted in Baldwin v. Munn, 2 Wend. 407.

1185. HORE v. CHAPMAN, 2 Salk. 636.

Quare was substituted for *quod cum;* and judgment was arrested after verdict.

Overruled in Coffin v. Coffin, 2 Mass. 358.

1186. HORE v. MILNER, Peake, 42.

Where the vendee by the consent of the vendor, deals with his goods as his own by selling them, the delivery is complete; for after *resale* the vendor cannot bring an action for goods bargained and sold.

Oppo. Mertens v. Adcock, 4 Esp. 251: Held, that a resale was no bar to the action.

1187. HORN v. HORN, Ambl. R. 79.

Denied in Dundas v. Dutens, 1 Ves. Jr. 196—Ld. Thurlow said:—"The opinion in Horn v. Horn, is so anomalous and unfounded, that forty such opinions would not satisfy me." See Grogan v. Cooke, 2 B. & Bea. 233; 1 Sto. Com. 361 *et seq.* 2 K. C. 440, 443.

1188. HORNCASTLE v. HAWORTH, 2 Marsh. Ins. 674.

Oppo. Langhorn v. Allnutt, 4 Taunt. 511.

1189. HORNER v. TWINING, 3 Pick. 492.

Wherever trover is the proper form of action, it will lie as well against an infant as an adult.

Denied in Penrose v. Curren, 3 Rawle, 352.

1190. HORNSBY v. LEE, 2 Madd. 16, sustained in Purdon v. Jackson, 1 Russel, 1, and followed in Honner v. Morton, 3 Russel, 298.

Oppo. Bates v. Dandy, 2 Atk. 207; Schuyler v. Hoyle, 5 John. Ch. 207; Udall v. Kenney, 5 Cowen, 507; Krumbaar v. Burt, 2 W. C. C. R. 406, Hartman v. Dowell, 1 Rawle, 281; Siter et al., Guardians of Jordan, 4 Rawle, 468. In this case, the husband conveyed to trustees the choses in action of the wife for the benefit of the latter and her child; and held that this passed the interest of both husband and wife, to the trustees, so that upon the death of the husband, the wife could not take as survivor, so as to entitle a second husband to claim them as his property. See the case for an able review of the English cases by C. J. Gibson.

1191. HORTON v. HORTON, Cro. Jac. 74.

"Mr. Justice Blackstone" spoke "still more slightly of the case of Horton v. Horton in Cro. Jac. which, he observed, was not determined, and was only upon a collateral point." 6 Burr. 2609.

1192. HORWOOD v. HEPPER, 3 Taunt. 421.

Ld. Mansfield and Lawrence, J. are said to have been of opinion

that the circumstance of a prostitute being placed at the husband's table was not sufficient to justify the wife's departure, so long as she could obtain support in the house.

Overruled in Houlston v. Smith, 3 Bing. 127; Gaselee, J. saying: "I have always understood the law as laid down by Ld. Kenyon, that if a man renders his house unfit for a modest woman to continue in it, she is authorised in going away."

1193. HORWOOD v. UNDERHILL, 10 East, 123.

Reversed on error, 4 Taunt. 346, S. C.

1194. HOSIER v. LORD ARUNDELL, 3 B. & P. 7.

Doubted in Partridge v. Court, 5 Price's R. 419, 423.

1195. HOSTLER'S CASE, Yelv. 66.

Much shaken. See Brennan v. Cament, ante.

1196. HOTHAM v. EAST INDIA COMPANY, Doug. 272.

The *dicta* of Ld. Mansfield and Buller, J. in that case, that if an agreement had been made in the course of the voyage, that the cargo should be delivered at a different port from that which was stipulated for in the charter party, and if that substituted contract was performed, the compensation for it *might be recovered in an action of covenant framed on the charter party*, were overruled by the Court in Thompson v. Brown, 7 Taunt. 756.

1197. HOTLEY v. SCOT, Loft, 316.

S. P. as in Doe v. Watson and in Clayton's case, (ante).

1198. HOUBLON v. MILNER, Lutw. 1039. 1042.

Said to have been denied to be law, by Ld. Hardwicke in the case of Hart and Holmes. Vid. 1 Wils. 63.

1199. HOULDITCH v. MILNE, 3 Esp. R. 86.

If a tradesman part with the possession of goods, upon which he has a lien, on the promise of a third person to pay the demand, held, that such promise is not within the statute of frauds.

Doubted in 1 Wms. Saund. 211 c. n. 1.; Boyce v. Owens, 2 M'Cord, 208; the nature of the consideration cannot affect the terms of the promise unless the liability of the original debtor be extinguished. But see 10 B. & C. 664; Olmstead v. Greenly, 18 J. R. 12; 2 N. H. R. 352.

1200. HOUSE v. HOUSE, 5 H. & J. 125.

Explained in Jones v. Hungerford, 4 Gill & J. 407—Buchanan, Ch. J.:—"It will be seen, on the examination of the record, that there was

an *innuendo*, that the defendant meant that the plaintiff was guilty of *arson*, and did *wilfully* burn the defendant's barn."

1201. HOWARD CH. PR., 77.

The rule that no evidence shall be admitted at the hearing but what is mentioned in the pleadings, qualified. Blacker v. Thepoe, 1 Moll. Ch. R. 357.

1202. HOWARD'S LESSEE v. POLLOCK et al., 1 Yeates R. (Penn.) 509.

The court denied an amendment to alter the date of the demise in ejectment.

Denied in Jackson v. Murray et al., 1 Cowen, 156.

1203. HOWARD v. MASON, 1 Root, 537.

A man may divert a stream of water to manure and enrich his meadow, to the prejudice of a mill that had been erected on the stream below, more than twenty years.

Overruled in Sherwood v. Burr, 4 Day, 224; Ingraham v. Hutchinson, 2 Conn. 584, 591.

1204. HOWE v. BOLINGBROKE, 1 Str. 639.

The court refused to permit a judgment to be entered up after a lapse of 20 years; the court observing that the debt was satisfied.

Denied in Smith's Ex'rs. v. Miller, 14 Wend. 191.—Sutherland.

1205. HOWE v. WHITFILD, 1 Ventr. 338, 339. See 2 Show. 57.

Denied in Doe d. Douglas v. Lock, 2 Ad. & El. 721—Denman:—"And the case as reported in Ventris, it should seem cannot be relied upon."

1206. HOWELL v. MAINE, 3 Lev. 403.

For a bond to a feme *before* coverture, the husband may sue alone.

Denied in Preston's Abst. of Tit. vol. 1, p. 348. Sed see 2 K. C. 142 and n. (e).

1207. HOWES v. BARKER, 3 John. R. 506.

S. P. as in Schermerhorn v. Vanderheyden, (post).

1208. HOWIS v. WIGGINS, 4 D. & E. 714.

That if the payee of a note pay it to an endorser, after bankruptcy of the maker, he may recover it of the maker, notwithstanding his bankruptcy and certificate.

Cited and disapproved of by Grose, J. in Cowley v. Dunlop, 7 T. R.

577; Vid. also Buckler v. Buttevant, 3 East, 71; Sarratt v. Austin, 4 Taunt. 200; Kennedy v. Carpenter, 2 Wharton R. 357, 8.

1209. HOYLE v. LUNDON, 3 Keble, 839.

Denied in Farr v. Newman, 4 T. R. 621. 649.

1210. HUBBEL v. COWDRY, 5 John. 132.

That a judgment in Connecticut, was to be regarded as a foreign judgment, and the statute of limitations of actions upon simple contracts, was applied.

Overruled in Andrews v. Montgomery, 19 John. R. 16; Gulick v. Loder, 1 Green's R. 68.

1211. HUBERT v. GROVES, 1 Esp. 148.

For any obstruction to a public highway, which is a public nuisance, though such should obstruct the party's business, an action on the case cannot be maintained by the party so obstructed; the only remedy is by indictment.

Overruled in Wilkes v. Hungerford Market Co., 2 Bingham's N. C. 281. See also Pierce v. Dart, 7 Cowen, 609.

1212. HUDSON v. HUDSON, 1 Atk. 460, (1737.)

Ld. Hardwicke considered administrators have not the same authority to release debts as executors.

Denied in Jacomb v. Harwood, 2 Ves. 267, where Sir John Strange said—"when that case was more narrowly looked into, it appeared clearly that that was applicable to the particular circumstances of the case. Willard v. Fenn, 2 Wheat. Selw. 574, n. 8; Murray v. Blatchford, 1 Wen. R. 617.

1213. HUGHES v. UNDERWOOD, 1 Mod. 28.

That the sealing of a writ of error is a supersedeas to the execution, and this, though the writ was defective and erroneous.

Denied in Meriton v. Stevens, Willes, 275.

1214. HULME v. TENANT, 1 Bro. Ch. Ca. 16.

This case has been doubted by Ld. Eldon. Vid. Nantes v. Corrock, 9 Ves. 188; Jones v. Harris, 9 Ves. 497.

1215. HUMBLE v. BILL, 2 Vern. 444; 1 Eq. Ca. Abr. 358, pl. 4.

Reversed in the House of Lords. See Savage v. Humble, 1 Bro. P. C. 71; 17 Ves. Jun. 160; but the reversal is considered to have proceeded from proof of fraud, and has not been attended to in subsequent cases. 2 Sug. on V. 57.

1216. HUNSCOM v. HUNSCOM, 15 Mass. 184.

Oppo. Jackson v. Gridley, 18 John. 98, and Curtiss v. Strong, 4 Day, 51.

1217. HUNSDON'S (LORD) CASE, Hob. 109.

Ld. Chan. would not follow the case in Hobart in restraining a party until the production of a lost instrument, which may never be capable of being produced, but should have directed the trial of an issue. Power v. Shiel, 1 Moll. Ch. R. 312.

1218. HUNT v. ROUSMANIER, 8 Wh. R. 174.

Seems to sustain the position, that a Court of Chancery will relieve against a mistake in law.

Denied in Wheaton v. Wheaton, 9 Conn. R. 101—Bissell, J.;—"It would not perhaps, be going too far to say, that the doctrines laid down by Ch. J. Marshall, in this case, were greatly shaken by the subsequent opinion of Judge Washington (S. C. 1 Pet. U. S. R. 1): and taking the whole case together, it will hardly warrant a departure from principles long considered as settled."

1219. HUNTER v. BEAL, cited 3 D. & E. 466.

Overruled in effect by Richardson v. Goss, 3 Bos. & Pul. 119, and Dixon v. Baldwin, 5 East, 175. 184; Vid. Rowe v. Pickford, 1 Moore, 526.

1220. HUNTER & HERNDON'S Ex. v. SPOTSWOOD, 1 Wash. 145.

S. P. as in Grant v. Bell, (ante).

1221. HURD v. WEST, 7 Cowen, 752.

That the declarations or admissions of the vendor of personal property, though made before the sale of it, were not evidence against the vendee.

Denied in Gibblehouse et al. v. Stong, 3 Rawle R. 450, 1—Kennedy.

1222. HURRY v. MANGLES, 1 Camp. 452.

Doubted and denied in Austen v. Craven, 4 Taunt. 644; and White v. Wilks, 5 Taunt. 176.

1223. HURST v. HURST, 2 Wash. C. C. R. 69; 3 Binn. 347, note S. C.

Overruled in Bank of N. America v. Fitzsimmons, 3 Binn. 342.

1224. HURST v. KIRKBRIDE, 1 Yeates, 139.

Doubted in Church v. Church, 4 Yeates, 281. See also 2 Dall. 172.

1225. HURST'S LESSEE v. M'NEIL, 1 Wash. Cir. R. 76.

That a deed executed, in order to give jurisdiction to the court, was a mere fictitious thing, not to be countenanced.

Doubted in Briggs v. French, 2 Sum. R. 259, 260; See Harrington v. Long, 2 M. & K. R. 592.

1226. HURST v. MEAD, 5 D. & E. 365.

Overruled in Ex parte Charles, 14 East, 197; Walker v. Barnes, 5 Taunt. 778.

1227. HUTCHINSON v. HODGSON, 2 Anstr. 361.

The V. Chancellor, in 5 Sim. 156:—"An ill reported case."

1228. HUTTON & Others v. BALME and Others, 2 Tyrw. R. 620.

Entitled wrong. It should have been Balme and others v. Hutton and others, See 3 Tyrw. R. 731. n. (a).

1229. HUTTON v. BRAGG, 2 Marsh. 339.

The Court of Common Pleas held, that by the charter of an entire ship, the possession was parted with to the charterer, so that the owner could have no lien for the freight upon goods put on board.

Limited, or rather narrowed in subsequent cases, so as to depend in respect to the possession upon the terms of the contract, the purpose and object of it. (Dean v. Hogg et al., 10 Bing. 345; 4 M. & S. 288; 8 Taunt. 293.)

1230. HUTTON v. DIBBLE, 1 Day, 121.

That a married woman can hold no separate property given in trust for her, either in law or equity, and that no debt could be raised to her separate use, and her husband, of course, was the *cestui que trust*.

Doubted by Reeve, J. in Goodwin v. Goodwin, 4 Day, 343, who says, —'To this I answer, if the case does recognize that doctrine, the opinion was an *obiter* opinion, and nowise necessary to determine that case. Such an opinion is opposed to all authority, and never was law, unless that decision has made it so. But admitting, that a wife can have no separate property, and that our books on this subject are to be given to the winds, yet surely the husband cannot be the *cestui que trust*; to suppose it, would be a violation of all principle.'

1231. HYAM v. EDWARDS, 1 Dall. 2; Fogler's Lessee v. Simpson, (cited in 1 Yeates, 17); Lessee of Douglass v. Sanderson, ib. 15.

That a copy of the register of births and deaths of the people called quakers in England, proved to be a true copy by an *ex parte* affidavit before the Lord Mayor of London, was good evidence in cases of pedigree.

Denied by Tilghman, C. J. in Kingston v. Lesley, 10 S. & R. 388, 9 :—"Although I do not approve of its principle, I would not overrule it at N. P."—"I was not satisfied with the rule established in these cases, because there is no more reason to admit *ex parte* affidavits in cases of pedigree, than in other cases, where it appears that better evidence is in your power."—But "considering all the authorities then, we must take it, that the case of Hyam v. Edwards is law."

1232. HYCKMAN v. SHOTBOLT, 3 Dyer, 279.

An entire wrong christian name was inserted in a bond, which the obligor signed by his true name, and by this he was sued. Held that he should have been arrested by the name in the bond, with an *al. dict.* as to the true name.

This case "may be good law, but the reason and common sense of it are not very palpable." 2 Caines, 363.

1233. HYDE v. FOSTER, Dick. 102.

Denied by Ld. Redesdale in Smith v. Hibern. Mine Comp., 1 Sch. & Lefr. 240.

1234. ILDERTON v. ATKINSON, 7 Term, 480.

Overruled in Scott v. M'Lellen, 2 Greenl. 204; Townsend & al. v. Downing, 14 East, 565; and see Hubbly v. Brown, 16 John. 70.

1235. ILSLEY v. STUBBS, 5 Mass. 283. (1 Ch. Pl. 189).

"Chattels in the custody of the law cannot at common law be replevied."

Denied in the American Jurist, No. 23, July 1834, p. 104 *et seq.*

1236. INGERSOLL v. VAN BOKELIN, 7 Cowen, 670.

Reversed in Van Bokelin v. Ingersoll, 5 Wend. 315.

1237. INGRAM v. SKINNER, 2 Show. 252.

If a person be sued as executor, he may, after a special imparlance, plead "joint executorship" in abatement.

Oppo. 2 Keble, 81.

1238. INGRAHAM v. WHEELER, 6 Conn. 277.

S. P. as in Lord v. Brig Watchman, (ante), viz. that a release being required of creditors in an assignment by a debtor rendered the instrument void as against dissenting creditors.

1239. INNES v. JACKSON, 16 Ves. jun. 356.

Sugd. (on Pow. p. 364. n. (l),) says—'the facts are correctly stated by Ld. Redesdale. In Mr. Vesey's Report they do not tally with Ld. Eldon's judgment.'

1240. IN THE CASE OF THE KENSINGTON, 1 Pet. Ad. Dec. 239, 240.

Upon the subject of a loss of a part of a cargo or other articles from the ship; *held*, each seaman shall stand answerable for it, if neither he nor any body else knows how the loss happened, nor, if by embezzlement, by whom the fraud was committed, to whatever sum his proportion may amount.

Overruled in Edwards et al. v. Shearman, 1 Gilpin, 461.

1241. IN THE MATTER OF GILBERT SHOTWELL, 10 John. R. 394.

Reversed in Clason v. Shotwell, 12 John. R. 31.

1242. IN THE MATTER OF WOOD, 1 Hopk. Ch. 6.

Overruled in 20 John. R. 492.

1243. IRONS v. SMALLPEACE, 2 B. & Ald. 552.

Ch. J. Abbott said:—"That by the law of England, in order to transfer property by gift, there must be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee.

Denied in Cotten v. Missing, 1 Madd. Ch. R. 176; Fink v. Cox, 18 John. 145; See Caines v. Marley, 2 Yerg. R. 582; and Pitts v. Mangum, 2 Bail. R. 588.

1244. IRVINE v. CAMPBELL, 6 Binn. 118.

In regard to what fell from the court favorable to the doctrine of lien, for the residue of the purchase money.

Denied in Kauffelt v. Bower, 7 Serg. & R. 76, by Gibson, J.

1245. IRVING & al. v. EATON, 2 Scott, 799.

An affidavit of debt in an action against the drawer of a bill of Exchange stated that the bill was *undue* and unpaid, and *disclosed no default of the acceptor*:—Held, sufficient.

Overruled in the Court of Exch. in Crosby v. Clarke, 1 M. & W. 296; Buckworth v. Levi, 5 M. & P. 23; 7 Bing. 251; 1 Dowl. 211.

1246. ISAAC v. DE FRIER, Ambl. 595.

This case is both imperfectly and erroneously reported in Ambler; but is corrected in Att'y. Gen'l. v. Price, 17 Ves. 371. 373.

1247. ISRAEL v. DOUGLAS, 1 H. Bl. 239.

That a written promise to pay money for another, will support an action for money paid to his use.

Denied in Johnson v. Collins, 1 East, 102, and Taylor v. Higgins, 3 East, 171.

1248. IVAT v. FINCH, 1 Taunt. R. 141.

Upon an issue between A. and B. whether C. died possessed of certain property, evidence may be given of declarations made by C. that he had assigned the property to A.

Doubted in Chadwick v. Webber, 3 Greenl. 146.

1249. JACKSON v. BELL, 19 John. R. 168.

'It seems that the lessor in ejectment cannot release the action.'

Denied in Jackson v. M'Claskey, 2 Wend. 544; The marginal note is wrong; (though the decision is right,) the motion was to plead such a release executed before the last continuance: the court place their refusal upon the laches of the defendant and his want of merits; not upon the technical ground that the lessor is not a party to the record.

1250. JACKSON v. BETTS, 9 Cowen, 208.

Reversed in 6 Wend. 173.

1251. JACKSON v. CHEW, 12 Wheat. 167.

The U. S. Sup. Court adopts the state decisions, because they settle the law applicable to the case; and the reasons assigned for this course, apply as well to rules of construction growing out of the common law, as the statute law of the state, when applied to the title of lands.

Explained in Marlatt v. Silk, 11 Pet. R. 22.—Barbour, J.

1252. JACKSON v. THE COMMONWEALTH, 2 Binn. 79.

Doubted it seems by Tilghman, C. J. in Duncan v. The Commonwealth, 4 S. & R. 451, 2:—"It may deserve further consideration, whether, even in a criminal case, the judgment may not be reversed *as to costs*, and affirmed as to the rest, or *vice versa*."

1253. JACKSON v. DUNSBURGH, 1 J. Cas. 94; Jackson v. Swart, 20 J. R. 87.

That a freehold to commence in futuro may be conveyed by bargain and sale.

Denied in Wallis v. Wallis, 4 Mass. R. 136, and in Welsh v. Foster, 12 ib. 96.

1254. JACKSON ex dem. BROWN v. BETTS, 9 Cowen, 208.

Reversed in Betts v. Jackson ex dem. Brown, 6 Wend. 173.

1255. JACKSON ex dem. ERWIN et al. v. MOORE, 6 Cowen, 706.

Reversed in Moore v. Jackson ex dem. Erwin et al., 4 Wend. 58.

1256. JACKSON ex dem. SMITH v. GOODELL, 20 John. R. 188.

Reversed in Goodell v. Jackson ex dem. Smith, 20 John. R. 693.

1257. JACKSON ex dem. VAN WYCK v. SEWARD, 5 Cowen, 70.

Reversed in Seward v. Jackson ex dem. Van Wyck, 8 Cowen, 406.

1258. JACKSON v. FAIRBANKS, 2 H. Bl. 340.

Very much doubted by the Court in Brandnam v. Wharton, 1 Barn. & Ald. 463.

1259. JACKSON v. FARRAND, 2 Vern. 424.

Ld. Hardwicke called this quite an anomalous case, and said he should lay no stress upon it. 1 Atk. 556.

1260. JACKSON v. GABREE, 1 Ventr. 51.

Overruled. Sayer's Rep. 150.

1261. JACKSON v. JOHNSON, 5 Cowen, 74.

Overruled in Clapp v. Bromagham, 9 Cowen, 530: Held, that a pos session may be adverse, though the agreement under which the claim is made be executory.

1262. JACKSON v. LAUGHHEAD, 2 John. R. 75.

Denied in Ellis v. Paige, 1 Pick. 48—Wilde, J.—"In the case of Jackson v. Laughhead, it was decided by a majority of the court, against the opinion of Thompson, J. that in ejectment against a mortgagor, notice to quit was necessary. This was never held to be law in this state; nor is it the law of England."

1263. JACKSON v. LEWIS, 13 John. R. 504.

That a witness cannot be impeached by showing either that she was now or was in her younger days a common prostitute.

Oppo. Commonwealth v. Murphy, 14 Mass. R. 387, which was a prosecution for a rape.

1264. JACKSON v. LOMAS, 4 T. R. 166.

An insolvent assigned over his effects for the benefit of his creditors, and in the deed there was a proviso that the shares of those creditors, who did not execute it before a given day, should be *paid to the insolvent:* Held, as it seems, that this provision would not make the deed invalid.

Doubted. Ingraham v. Wheeler, 6 Conn. R. 277; Hyslop v. Clark, 14 J. R. 458; Brasear v. Hest, 7 Pet. R. 608; 2 K. C. 534, n. (a).

1265. JACKSON v. LUQUERE, 5 Cowen, 221.

Doubted in Bool and Wife v. Mix, 17 Wend. 119

1266. JACKSON v. MOORE, 6 Cowen, 706.

Reversed in Moore v. Jackson, 4 Wend. 58.

1267. JACKSON v. NEELY, 10 J. R. 374. (1813).

The depositing the conveyance, which recited the power of attorney by which the conveyance was made, the subsequent purchaser had notice of the power by means of the recital, and is affected equally as if the power itself had been deposited.

Overruled in Wendell v. Wadsworth, 20 J. R. 659; Jackson v. Bowen, 6 Cow. R. 146.

1268. *JACKSON ON REAL ACTIONS*, 114.

In a writ of entry on disseisin done by defendant, the latter may plead in bar a disseisin done by his ancestor and a descent cast.

Overruled in Gordon v. Pierce, 2 Fairf. R. 213. "An exception of this sort must be taken in abatement." S. P. 4 Greenl. R. 20.

1269. JACKSON v. PIGOTT, Ld. Raym. 364; 12 Mod. 212.

If the declaration allege in terms an acceptance made before the time limited by the bill for its payment, the plaintiff will be precluded from giving in evidence acceptance afterwards.

Denied. Bayl. 5th ed. 393; 2 Phil. Ev. 4; Molloy v. Delves, 5 Mo. & P. 273; S. C. 4 C. & P. 492; Vid. Penn v. Flack et al., 3 Gill & J. 369.

1270. JACKSON v. PLUMBE, 8 John. R. 378; S. P. in 14 ib. 245; 19 ib. 300; 2 Cowen, 770.

That when a corporation sues, either on a contract, or to recover real property, they must, at the trial, under the general issue, prove that they are a corporation.

Doubted. Conrad v. The Atlantic Ins. Co., 4 Pet. 450:—"By pleading to the merits, the plaintiff necessarily admitted the capacity of the plaintiffs to sue."

1271. JACKSON v. POST, 9 Cowen, 120.

Explained in Jackson v. Chamberlain, 8 Wend. R. 620, 627.—Error in the Report.

1272. *JACKSON'S CASE*, Russ. & Ry. 487.

It appeared that the prisoner got into the woman's bed, as if he had been her husband, and was in the act of copulation, when she made the discovery; upon which, and before completion, he desisted. Four judges thought it amounted to a rape; but eight judges thought it would not.

Doubted. Vide 1 Wh. Cr. Law, 381, n.

1273. JACKSON v. SACKETT et al., 7 Wend. 94:—

Ejectment for land mortgaged; and the notes having lain more than 6

years after they were due, no action could be sustained upon them; that the time was evidence of payment, which might be presumed, in analogy to the presumption of payment of specialties after 20 years.

Denied in Belknap v. Gleason, 11 Conn. 160, 166: Held, that the security of a lien was not impaired in consequence of the debts being barred by the statute of limitations.

1274. JACKSON v. SCHAUBER, 7 Cowen, 193.

Reversed in Schauber v. Jackson, 2 Wend. R. 13.

1275. JACKSON v. SEWARD, 5 Cowen, 67.

Reversed in Seward v. Jackson, 8 Cowen, 406.

1276. JACKSON v. STETSON, 15 Mass. 48.

If defendant pleads a justification in slander and also the general issue; it is an admission of the speaking of the words even under the general issue.

Denied in Starkweather v. Kittle, 17 Wend. 20; See also Cilley v. Jenness, 2 N. H. R. 89; Melvin v. Whiting, 13 Pick. 184.

But in 6 Car. & P. 535 note (a), it is said that under the rule of Court of H. T. 4 W. 4.—"In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged."

1277. JACKSON v. STILES, 3 Caines' R. 93.

The Court, in 3 John. R. 449, say "There were peculiar circumstances, though not fully reported which afforded strong reason to believe that there was really no defence on the merits."

1278. JACKSON v. TUTTLE, 9 Cow. 233.

Reversed in 6 Wend. 213.

1279. JACKSON v. WOOD, 3 Wend. R. 27.

Reversed in 8 Wend. R. 1.

1280. JACOB v. ALLEN, 1 Salk. 27.

Administrator's attorney collects debts and pays over the money; then a will is found, and administration is repealed. Held that the executor may maintain *ind. assumpsit* against the attorney for money received to his use.

Ruled contra in Pond v. Underwood, 2 Ld. Raym. 1210; Vid. 4

Burr. 1984. Sadler v. Evans. Also Allan v. Dundas, 3 D. & E. 125, and Cowp. 565.

1281. JACOBS v. AMYATT, 4 Bro. Ch. Ca. 542.

Seems questionable since Doe v. Applin, 4 D. & E. 82; Lyon v. Mitchell, 1 Maddock Ch. R. 467. 486.

1282. JACOB v. HARWOOD, 2 Ves. 265.

Same principle as in Nugent v. Gifford, and Meade v. Ld. Orrery.

Denied in Petrie v. Clark et al., 11 S. & R. 386—Gibson, J.:—"But it was ruled differently in Crane v. Drake, 2 Vern. 616, the authority of which is certainly strengthened by the reversal of Humble v. Bill, in the House of Lords, 2 Vern. 444; notwithstanding what Ld. Hardwicke says of these two cases in Meade v. Ld. Orrery. Indeed, my mind is not prepared to acquiesce in the decision by that Chancellor, of any of the cases that came before him."

1283. JAMES v. JOHNSON and MOREY, 6 J. Ch. R. 417.

Reversed in James v. Morey, 2 Cowen, 247.

1284. JAMES v. M'KERNON, 6 Johns. R. 543.

Reversing decree of Ch. upon the ground of the admission of evidence in respect to what was not in issue by the pleadings—the general rule being that no interrogatories can be put that do not arise from facts properly in issue.

1285. JAMES v. RICHARDSON, T. Raym. 330, in Cam. Scac. reversing the judgment of B. R.

Reversed in Dom Proc. and the judgment of B. R. affirmed. 3 Lev. 232.

1286. JAMES & JOHNSON, 1 Mod. 232.

This case goes the length of saying that every prescription, when found, must be presumed to have a reasonable commencement.

Denied, in case of a prescription against public right, as to take toll on a navigable river, &c. Willes, 116.

1287. JANSEN v. STOUTENBERGH et al., 9 J. R. 369.

Where it was held, that an action of debt for an escape against a sheriff, was cognizable in a Justice's court.

Overruled in Brown v. Genung, 1 Wen. R. 115.

1288. JENDWINE v. SLADE, 2 Esp. R. 572.

Denied in Osgood v. Lewis, 2 Maryland R. 522, 3.

1289. JENKINS v. PRITCHARD, 2 Wils. 47.

Statement of the judgment corrected per Ld. Alvanley, 2 Bos. & Pul. 658.

1290. JEWELL'S CASE, 5 Rep. 3 a.

A rent reserved on a lease for years by a bishop, of an incorporeal thing, as of a fair, &c. is good by way of contract between lessor and lessee; but yet such rent is not incident to the reversion, and his successor shall avoid it.

Overruled in Talentine v. Denton, Cro. Jac. 111; Vid. Bally v. Wells, 3 Wils. 25; Windsor v. Gover, 2 Saund. 302. 304. n. 9.

1291. JENKINS v. SLADE, 1 C. & P. 270.

A certificated conveyancer can maintain no action for his fees.

Overruled in Poucher v. Norman, 5 D. & R. 648; 3 B. & C. 744; S. P. Davies v. Sibly, 6 D. & R. 4.

1292. JENNINGS v. MOORE et al., 2 Vern. 609.

If A. purchases in the name of B., with knowledge of a prior incumbrance, yet he shall be affected with the notice to A., because B., by approving of A's. conduct, made him his agent *ab initio.*

Doubted by Ld. Hardwicke in Le Neve v. Le Neve, 3 Atk. 649. But see 14 Pick. 34.

1293. JERRY v. THE STATE, 1 Black. R. 395.

Doubted in U. States v. Gibert, 2 Sum. R. 52, 53.

1294. JOHNES v. LOCKHART, ADAMSON v. ARMITAGE, 19 Ves. 416.

Seems to have been considered as affirming the doctrine that a bequest to a *feme covert* 'for her own use,' will exclude the husband's control of it.

Denied in 2 Com. Eq. Jur. p. 610, n. (3). "These opinions seem to have proceeded in a good measure upon a misunderstanding of the case of Johnes v. Lockhart, now correctly reported in 3 Bro. Ch. R. 383, Mr. Belt's note."

1295. JOHNSON v. COLLINGS, 1 East, 98; Vide Milne v. Prest, 3 Camp. 393; Holt, C. N. P. 181.

A promise to accept a non-existing bill, not an acceptance.

Oppo. Coolidge v. Payson, 2 Wh. R. 66; Weston v. Clements, 3 Mass. 1, provided a bill be drawn within a reasonable time afterwards. 1 Pet. 283; 15 John. R. 6; 10 ib. 203; 11 Mass. 54; 5 ib. 11; 2 Wend. 545; 5 ib. 414; Vid. R. S.

1296. JOHNSON v. GILSON, 4 Esp. C. 21; 1 Stark. Ev. 347, 8.

Where notice was given to produce a letter which expressed that it contained several enclosures, but without referring to them particularly, it was held that the party producing the letter was not entitled to have the enclosures read.

Doubted. See the observations of Spencer, J. in Kenny v. Van Horne et al., 1 John. R. 395; and Withers et al. v. Gillespy, 7 S. & R. 10, 14 *et seq.* See also note 647, 1 Phill. Ev. p. 361.

1297. JOHNSON v. HUDSON, 11 East, 180.

Doubted in Brooker v. Wood, 3 Nev. & M. 96.—Littledale.

1298. JOHNSON v. KENYON, 2 Wils. 262.

——" that case is inaccurately reported; and I am much disposed to think that the Chief Justice never said what he is there stated to have said." Per Wils. on J. in Bacon v. Searles, 1 H. Bl. 88; Vid. also Walwyn v. St. Quintin, 1 Bos. & Pul. 658.

1299. JOHNSON v. LEIGH, 1 Marsh. 565; Ratcliffe v. Burton, 3 B. & P. 229.

If the sheriff break the doors of the house of a third person in order to execute the process of law upon the defendant, or his property, removed thither in order to avoid an execution; still he does so at his peril; for, if it turn out that the defendant was not in the house, or had no property there, he is a trespasser.

Explained in Hutchinson v. Birch, 4 Taunt. 627; Com. Dig. Execution, C. 5; See White v. Whitshire, Palm. 52; 2 Rolle, 138; Biscop v. White, Cro. Eliz. 759; and judgment in Cooke v. Birt, 5 Taunt. 769; 2 H. Bl. 120.

1300. JOHNSON v. LEWELLIN, 6 Esp. 101.

S. P. as in King v. Middlezoy, (post).

1301. JOHNSON v. MASON, 1 Esp. 89.

That the confession of the party executing a deed is not admissible evidence; but it must be proved by the subscribing witnesses.

Such confession *is* admissible in N. York. Hall v. Phelps, 2 Johns. 451.

1302. JOHNSON v. PROCTOR, Yelv. 175; Cro. Eliz. 809; Cro. Jac. 233.

Explained. The ground upon which this case was decided was said by Kennedy, J. in 3 Pen. R. 326, to have been misapprehended by Ld. Eldon in Browning v. Wright, 2 B. & P. 25, and also by the Judge in delivering the opinion of the court in 16 S. & R. 112.

1303. JOHNSON v. MEDLICOTT, 3 P. Wms. 131, n.

Oppo. Pitt v. Smith, 3 Camp. 35; Fenton v. Holloway, 1 Stark. 126; Vid. Butler v. Mulvihill, 1 Bligh, 137.

1304. JOHNSON v. THOMPSON, 4 Desaus. R. 458, 9.

Doubted in M'Donald v. Crockett, 2 M'C. Ch. R. 132, 133, as it would seem, whether the facts are all reported.

1305. JOHNSON v. THE LADY WALTERSTAFF, 1 Pet. Ad. Dec. 215; and Cranmer v. Gernon, 2 Pet. Ad. Dec. 391; S. P. as in the Cynthia, (ante).

Overruled in Bronde et al. v. Haven, 1 Gilpin R. 592. 604.

1306. JOHNSON v. WEED & al., 9 Johns. 310.

The reasoning of the Judge who gave the opinion, is said to go farther than the rest of the Court meant to go. Whitbeck v. Van Ness, 11 Johns. 412.

1307. JOHNSTON v. JOHNSTON, 1 Philli. R. 447.

That marriage and a child need not both occur to create an implied revocation of a will.

Doubted in Brush v. Wilkins, 4 John. Ch. R. 506; and it seems overruled in Gibbons v. Cross, 2 Addams' R. 455.

1308. JOHNSTON v. MARTIN, 3 Murph. 248.

That the discharge of the plaintiff from the prosecution, by competent authority, after full examination, is *prima facie* evidence of the want of probable cause; and the burden of proving the probable cause is then thrown upon the defendant.

Doubted in M'Rae v. O'Neal, 2 Dev. R. 169. See also Purcell v. M'Namara, 9 East, 361.

1309. JOICE v. WILLIAMS, Park, 627; S. C. Hughes, 346.

The lender on bottomry is not liable either to average or salvage.

Doubted. See 1 Phil. on Ins. 301; also 3 K. C. 358, 359. Chandler v. Garnier, 6 Mart. Lou. R. 599. N. S.

1310. JONES v. BRODIE, 3 Murph. R. 594.

Overruled in Rayner v. Watford, 2 Dever. R. 338.

1311. JONES v. COOPER, Cowp. 228.

A distinction between a promise for the payment for goods, &c. for another *before*, and *after*, delivery; the former being held to be an original undertaking, and so binding,—the latter collateral, and within the Stat. frauds.

This distinction overruled. Matson v. Wharam, 2 D. & E. 80; Anderson v. Hayman, 1 H. Bl. 120.

1312. JONES v. DAVIES, 1 B. & C. 143.

Doubted in The King v. Pasman, 4 Nev. & Man. 730—Littledale —" Jones v. Davies is not a case I should be disposed to follow."

1313. JONES v. DUTCH, 4 Price, 300; Chit. on Bills, p. 22.

It seems an unsettled point in England, whether an infant first indorsee can entitle the holder to sue on it. Nightingale v. Withington, 15 Mass. 272: Held, that he may.

1314. JONES v. EAMER, Anstr. 675.

That putting in and justifying bail before the expiration of the rule to bring in the body, is no bar to an action for the escape.

Overruled in Murray v. Durand, 1 Esp. 87; Pariente v. Plumbtree, 2 Bos. & Pul. 35.

1315. JONES v. EDMONDS, 3 Murph. R. 43.

A judgment is still a lien upon the lands of which the debtor was seized at the time of its rendition, if the creditor sue out an *elegit*; but if he refuse to sue out a *fi. fa.*, the lands are bound only as chattels.

Doubted in Ricks v. Blount, 4 Dev. R. 133.

1316. JONES v. HOAR, 5 Pick. 285.

Where trespass had been committed upon land, and trees cut and carried away, but not sold and converted into money, assumpsit for timber as for goods sold and delivered, would not lie.

Oppo. Hill v. Davis, 3 N. H. R. 384.

1317. JONES v. THE INS. CO. OF NORTH AMERICA, 4 Dall. R. 246.

Reversed in The Ins. Co. of N. America v. Jones, 2 Binn. 547.

1318. JONES, (SIR WM.) LAW OF BAILMENTS, 52. 60.

That an action lies for damage arising from the non-performance of a promise to become a mandatory, though it be gratuitous.

Denied in Thorne v. Deas, 4 John. R. 84. 96; Kent, C. J.

1319. JONES v. LEWIS, 2 Sim. & Stu. 242.

S. P. as in Princess of Wales v. The Earl of Liverpool, (post).

1320. JONES v. MORGAN, 2 Camp. 474.

Overruled by Tanner v. Bean, 4 B. & C. 312: *Held*, in an action against the drawer or indorser of a bill, for default of payment, if it be

unnecessarily alleged the bill was accepted, yet the acceptance need not be proved.

1321. JONES et al. v. RADFORD, 1 Camp. 83, n.

That an acceptance after an indorsement by one of the payees, admits the regularity of the indorsement.

Denied by Mr. Chitty (on B. p. 631. 8th Am. ed.)

1322. JONES, (SIR WILLIAM'S) REPORTS, in K. B. & C. B. from 18 James 1, to 15 Charles 1.

'In Chanley v. Wistanley, T. 44 Geo. III. when the counsel questioned a case in Jones, as anonymous, Lawrence, J. said that Jones was not a reporter to mistake the law of a case, though he might not hear the name.' Bridg. L. B. 180.

1323. JONES v. LORD SAY & SELE, 8 Vin. Abr. 262; 1 Eq. Abr. 383; 3 Bro. P. C. 458.

Lord Kenyon said it was a case by itself. Cited by Lawrence, J. in Wykham v. Wykham, 3 Taunt. 316.

1324. JONES v. SMITH, 4 Hall's Law Journal, 276.

P. somewhat similar to The Cynthia, (ante).

Denied in Bronde v. Haven, 1 Gilpin R. 604.

1325. JONES v. TEMPLE, 1 Wash. 42; 1 Dall. 63.

That a seal was not necessarily something impressed on wax.

Denied in Warren v. Lynch, 5 J. R. 245.—Kent.

1326. JONES v. WESTCOMB, 1 Eq. Cas. Abr. 245.

" A. possessed of a long term for years by will devised it to his wife for life, and after her death to the child she was then enciente with, and if such child died before it come to 21, then he devised one third part of the same term to his wife, her executors and administrators, and the other two thirds to other persons; and made his wife executrix of his will and died." *Held*, that though the wife was not enciente at the time of the will, yet the devise to her of such third part of the term, was good.

Overruled in Fulham v. Wickett, Willes R. 303: S. P. in Carpenter v. Heard, 14 Pick. 454 to 460.

1327. JONES v. WILLIAMS, Doug. 214.

That if the condition of a bond be that obligor shall not embezzle, &c. it is necessary, in assigning a breach thereon, to state the particular sum embezzled, and how or from whom it was received.

Overruled in Barton v. Webb, 8 D. & E. 459; Shum v. Farrington, 1 Bos. & Pul. 640.

1328. JORDAINE v. LASHBROOKE, 7 D. & E. 601.

Action by indorsee on a foreign bill of exchange unstamped, and *drawer* admitted as a witness to prove the bill drawn in London and dated abroad to defraud the revenue.

In Massachusetts, the party to a negotiable instrument, is not admitted as a witness to prove it void, when he gave it currency. Churchill v. Suter, 4 Mass. 156. See acc. 2 Dall. 194; 1 Day's Cas. 17. 301; 1 Caines, 258. 267; 1 Hen. & Mumf. 175; 1 Hayw. 397. n. 2 Cran. 202.

1329. JORDAN v. LEWIS, Stra. 1122; Reported also in 14 East, 304, note (a).

Reported, it is said, (O'Neall, J. 2 Hill R. 675) more accurately in East.

1330. JORDAN v. WILKINS, 3 Wash. C. C. R. 112.

The general rule, that the defendant must avail of a non-joinder of a joint contractor does not apply, when the plaintiff has not in his declaration disclosed the nature of his demand.

Overruled in Barry v. Foyles, 1 Pet. 311.

1331. JUDAH v. HARRIS, 19 John. R. 144.

A note payable at a Bank, "in the bank notes current in the city of New York," was held to be negotiable.

Denied in M'Cormick v. Trotter, 10 S. & R. 94.

1332. JUHEL v. CHURCH, 2 J. Cas. 333.

A wagering policy was considered legal.

Oppo. Amory v. Gilman, 2 Mass. 1; Babcock v. Thompson, 3 Pick. 446; Adams v. Penn. Ins. Co,. 1 Rawle, 107; and now New York, R. S. v. 1, p. 662. s. 8, 9, 10.

1333. *KAIMES, LORD.*—'His extreme inaccuracy in what he ventures to state with respect both to the ancient Canon law and the modern English law, tends not a little to shake the credit of his representations of all law whatever.' Per Sir *Wm. Scott* in 2 Hag. R. 92.

1334. KANE v. SANGER, 14 John. 89.

Denied in Wythy v. Mumford, 5 Cowen, 140, as to the remark of Spencer, J. "that the assignee, with warranty, could not maintain an action, as assignee, for a breach after the assignment:"—Savage, C. J. saying "the remark was not called for. It professes to be supported by no authority but Bickford v. Paige, 2 Mass. R. 460. I do not understand such doctrine to be there asserted."

1335. KAY v. BROOKMAN, 1 M. & M. 286.
S. P. as in Page v. Mann, (post.)

1336. KAY v. DUCHESS De Pienne, 3 Camp. R. 123, and Gregory v. Paul, 15 Mass. 31, and Robinson v. Reynolds, 1 Aik. R. 174.

Held, that if a foreigner, though resident abroad when the suit is brought, had ever resided here, his wife could not sue.

Opposed. Bean v. Morgan, 4 M'Cord R. 148, and it seems 2 K. C. 156, 7, where it is observed, that there is no distinction in principle, between husbands who are aliens, and who are not aliens.

1337. KEATES v. WHIELDON, 8 B. & C. 7.

Overruled. See Cheetham v. Butler, 2 Nev. & Man. 453; 5 B. & Adol. 837, S. C. and see Dixon v. Chambers, 1 Cr. M. & Ros. 845. Held, that where by a promissory note, A. promised to pay B. on demand £20 with lawful interest until payment, for value received:— Held, that this was not a note payable to bearer on demand, but was a note payable otherwise than to bearer within two months after date.

1338. KEBLE.

Park, J. said, (6 Bing. 656):—"Lord Kenyon reprimanded me when I was at the bar for citing Keble."

'Of questionable credit.' 1 Wood, 99 note. Park, J. (in Rex v. Sutton, 1 Leg. ex. & Law Chron. 203), says—"I remember making a minute of the censure passed by Ld. Kenyon on Keble's Reports; and when I went home from court I destroyed them, not considering it worth while to keep a refuse book in my library."

'Not an accurate reporter.' 4 Term, 646. 649. 'A bad reporter.' 3 Term, 17. 'Another case in 3 Keble, 540, is a loose note by a bad reporter,' Doug. 305. 'Though an inaccurate reporter, yet (is) a tolerable historian of the law.' 3 Wils. 330. 'Keble seldom enlightens any thing.' Willes, 245. 'Though far from being an accurate, is a pretty good register.' Ridgway, 100. 'A feeble reporter.' Ib. *note.*

1339. KEECH v. HALL, Dougl. 21; Thunder d. Weaver v. Belcher, 3 East, 449.

The dictum, that when the mortgagor is left in possession, "the true inference to be drawn, is an agreement, that he shall possess the premises, at will, in the strictest sense; and, therefore, no notice is ever given him to quit."

Explained in Rockwell v. Bradley, 2 Conn. R. 5. 9. 13. 15 *et seq.* "See Doe v. Giles, 5 Bingh. 421; Doe v. Maisey, 8 B. & C. 767; Thunder v. Belcher, 3 East, 449; Smartle v. Williams, 3 Lev. 387; 1 Salk. 245. In Doe dem. Rogers v. Cadwallader, 2 B. & Adol. 473, the wife of the lessor of the plaintiff had become mortgagee of the premises in question by a deed, dated the 7th of May, 1828. Interest was payable on the 25th of De-

cember every year; and had been paid up to the 25th of December, 1830; the demise was on the 1st of July, 1830, and the defendant, who had been let into possession after the mortgage by the mortgagor, contended that the action was not maintainable, because it was not competent to a mortgagee to treat the mortgagor, or his tenants, as trespassers, at any time during which their lawful possession had been recognized by him; and that, by receiving the interest of the mortgage-money, on the 25th of December, 1830, he had acknowledged that up to that time the defendant was in lawful possession of the premises; but the court gave judgment for the plaintiff, on the ground that the receipt of interest was no recognition of the defendant as a person in lawful possession of the premises. However, in Doe dem. Whittaker v. Hales, 7 Bing. 322, Austen, having mortgaged the premises to the lessor of the plaintiff, let them to the defendant. The mortgagee directed his attorney to apply to Austen for the interest; and the attorney, in April, 1830, applied to the defendant for rent to pay the interest, threatened to distrain if it were not paid, and received it three or four times. The learned Judge at the trial, and the court, in Banco afterwards, held that these facts amounted to a recognition that the defendant was lawfully in possession in April, 1830, and consequently that he could not be treated as having been a trespasser on December 25, 1825, the day on which the demise was laid. Lord Tenterden, delivering judgment in Doe v. Cadwallader, took some pains to distinguish that case from Doe dem. Whittaker v. Hales: "there," says his lordship, "the defendant, in order to show that he was not a trespasser on the 25th of December, 1829, proved that in April, 1830, he was in possession of the premises; and that an agent of the lessor of the plaintiff called on him, demanded payment of interest on a mortgage to the lessor of the plaintiff, and received money *eo nomine*, as interest, the defendant being required to pay it instead of rent to the mortgagor. Lord Chief Justice Tindal, after stating these facts, observes, 'this, therefore, was a demand made by the agent of the mortgagee, and with full knowledge of all the circumstances of the parties, namely, that the defendant was tenant to the mortgagor, and not to the lessor of the plaintiff, and if a party employs an agent, who has full knowledge of the circumstances, it must be presumed that the principal has the same knowledge, so that the lessor of the plaintiff, having recognised and availed himself of the possession of the defendant, so late as April, 1830, cannot treat him as a trespasser in 1829.' That case is very distinguishable from the present: the evidence in this case was only that the mortgagee had received interest on the money advanced by him for a period covering the 1st of July, 1830, the day of the demise mentioned in the declaration. By so receiving the interest he did not recognise the defendant as a person in lawful possession of the premises, nor did he avail himself of that possession to obtain payment of the interest."

Smith's Lead. Cas. p. 296, *et seq.* concludes thus:—"Upon the whole it is concluded, 1st, That, if there be in the mortgage-deed an agreement that the mortgagor shall continue in possession till default of payment on a certain day, he is in the mean while termor of the intervening term. 2dly, That, if default be made on that day, he becomes tenant at sufferance. 3dly, That, where there is no such agreement, he is tenant at sufferance immediately upon the execution of the mortgage, unless the mortgagee expressly or impliedly consent to his remaining in possession. 4thly, That such consent renders him tenant at will. 5thly, That if in any of the last three cases he let in tenants, they may be treated by the mortgagee, if he think proper, as *tort feasors*. 6thly, That, if the mortgagee recognize their possession, they become his tenants. Lastly, that the mere receipt of interest, from the mortgagor does not amount to such a recognizition."

1340. KEICHLEY v. COUSTON, 1 Barnard. 43.

If a *ca. sa.* be tested out of term it may be amended

Oppo. Johnson v. Nayler, 12 Mod. 247.

1341. KEILY v. MONCK, 3 Ridgw. P. C. 205.

Ld. Clarke's reasoning doubted, 1 Moll. Ch. R. 611.

1342. KEILWAY, 98. b. pl. 4.

'In which Fineux & Brudenell, Justices of K. B. in the time of Hen. 8th, were of opinion that if a man have a house underneath, and another have a house over it, as is the case in London, the owner of the first house may compel the other to cover his house, to preserve the timbers of the house underneath; and so may the owner of the house above compel the other to repair the timbers of his house below; and this by action of the case.

Doubted in Tenant v. Goldwin, 6 Mod. 314, by Ld. Holt who was of opinion, that such writ, which is in F. N. B. 296, was by particular custom, and not of the common law; and he doubted the case in Keilway.—But in Loring v. Bacon, 4 Mass. 575, Parsons, C. J. says:—"We do not now decide on the authority due to the case in Keilway; but if an action on the case should come before us founded on that report, it will deserve a further consideration."—He adds—"But there is unquestionably a writ at common law *de domo reparanda*, the form of which we have in Fitz. N. B. 295, in which A. is commanded to repair a certain house of his in N. which is in danger of falling, to the nuisance of the freehold of B. in the same town, and which A. ought, and hath been used to repair, &c. This writ, Fitzherbert says, lies, when a man, who has a house adjoining to the house of his neighbor, suffer his house to lie in decay, to the annoyance of his neighbor's house. And if the plaintiff recover, he shall have his damages; and it shall be awarded that the defendant repair, and that he be restrained until he do it. But it is otherwise in an action of the case; for there the plaintiff can recover damages only. And there appears no reasonable cause of distinction in the cases, whether a house adjoin to another on one side, or above, or underneath it.

But if the case in Keilway is law, the plaintiff cannot recover, for by that case the defendant could have compelled the plaintiff to repair his house, or compensate her in damages for the injury she had sustained from his neglect to repair it. And he has the like remedy against her.

If the case in Keilway is not law, then upon analogy to the writ at common law, the plaintiff cannot compel the defendant to contribute to his expenses in repairing his own house. But if his house be considered as adjoining to hers, she might have sued an action of the case against him, if he had suffered his house to remain in decay to the annoyance of her house."

1343. KEITH (Lord) v. KEIR, Faculty Decisions, vol. 13, p. 679.—June 10, 1812.

A person employed by the defendant to clear land of furze, contrary to express direction of the master, used fire for the purpose; held, that the master was liable for damage resulting from such use of fire.

Denied in M'Kenzie v. M'Leod, 4 Moore & Scott, 254—Park.

1344. KEITH v. JONES, 9 John. R. 120; Judah v. Harris, 19 John. 144.

A note payable in bank bills was negotiable within the statute, if confined to a species of paper universally currant as cash.

Decided differently in England, Bayley on Bills, p. 6; 3 K. C. 75, and in Pensylvania, Gray v. Donahoe, 4 Watts, 400; M'Cormick v. Trotter, 10 S. & R. 94.

1345. KELLOCK v. ROBINSON, 2 Stra. 745.

Held that where the indorsee of a promissory note receives part of the money from the maker, this discharges the indorser.

Overruled in Walwyn v. St. Quintin, 1 Bos. & Pul. 652.

1346. KELLY v. HOLDSHIP, 1 Browne, 36.

The party's book must be produced like any other written evidence, as higher evidence.

Denied in 1 Phill. Ev. p. 266, in note 491 p. 700.

1347. *KELYNGE, LD. C. J.*—'Lord Holt was the learned publisher of Kelynge's Reports.' Foster's Cr. L. 204.

John Randolph in Chase's Trial, 258, said, "who Sir John Kelynge was, will appear from the 4th vol. Hatsell's Precedents. Upon complaint being made of innovations in the right of trial by jury, a committee was appointed to investigate the conduct of C. J. Kelynge." But R. G. Harper in p. 267 said he was honorably acquitted, and that his decisions were cited as law by Hale & Hawkins.

1348. KEMP v. FYSON, 3 D. P. C. 265.

Overruled in Blundell v. Hanson, 2 M. & W. 243; 5 D. P. C. 457. A declaration delivered on the 9th Jan. indorsed to plead in 4 Days, and on the same day plaintiff demanded a plea. The plaintiff having signed judgment for want of a plea, at one o'clock on the 14th: Held, that the judgment was regular.

1349. KENNEDY v. GREGORY, 1 Binn. R. 35.

Defendant in an action of slander, might give in evidence, in mitigation of damages, that a third person told him what he related.

Doubted in Coleman v. Southwick, 9 J. R. 45.

1350. KENNON v. M'ROBERTS, 1 Wash. R. 96.

That the word "estate" used in the introductory clause alone, (in a will) might be transposed to the devising clause, so as to enlarge the interest devised, from a life estate, according to the legal import of the words of the devise, to an estate in fee.

Denied in Beall v. Holmes, 6 Har. & J. 224.

1351. KENRIG v. EGGLESTON, Alleyn, 93.

A box with a great sum of money in it was delivered to a carrier, who was *artfully told* it contained only goods of *mean value*. He was robbed, and held liable. *Quod durum videbatur circumstantibus.*

"Now I own that I should have thought this a fraud: and I should have agreed in opinion with the *circumstantibus*." Per Ld. Mansfield, in Gibbon v. Paynton, 4 Burr. 2298.

1352. KENSINGTON v. WHITE, 3 Price, 164.

Denied Per Leach V. Ch. in 2 Sim. & Stu. 87:—"The report of the case of Kensington v. White, is too loose to afford any principle; and underwriting causes are not to be reasoned upon as furnishing general rules."

1353. 2 KENT'S COM. LECT. 39. p. 458.

"The personal incompetency of individuals to contract, as in the case of infancy, and the general capacity of parties to contract, depend upon the law of the domicil."

Denied in Putnam v. Putnam, 8 Pick. 433, *as it seems*, and in 17 Mart. 596; 16 ib. 192.

1354. 3 KENT'S COM. 346.

The principle of the Common law in respect to boundaries on rivers or streams *above tide water* has been adopted in New York.

Doubted in The Canal Commrs. v. The People, 5 Wend. 422.

1355. 3 KENT'S COM. 349.

Denied by Mr. Justice Wilde, in 11 Pick. 213:—"Much, therefore, as we respect the opinion of Chancellor Kent, we cannot agree with him when he adds, that if land is conveyed, bounded by a highway, the soil and freehold to the centre of the highway will pass. The law here, and in England, and in New York, and other states, is clearly settled, I apprehend, to the contrary."

1356. KENT v. HARPOOL, 1 Ventr. 306.; Sir Tho. Jones, 76, 77; Pollexf. 306. S. C.

Grandfather tenant for life, remainder to father for life, remainder to father's first son in tail, reversion to grandfather in fee. The grandfather died, then a son was born to the father—and whether the descent of the fee to the father destroyed the contingent remainder was the question: and the Court seemed to think it did.

Said to be denied, per Reeve J. Sed quære, and vid. 2 Saund. 382. c. n.

1357. KENT v. LOWEN, 1 Campb. 177.

Letters of payee admitted to prove usury in the original concoction of a note, in an action by the indorsee v. the maker.

Not law in Massachusetts. Churchill v. Suter, 4 Mass. 156. Vid. also the cases under Jordaine v. Lashbrooke, ante.

1358. KETTLE v. BROMSALL, Willes' R. 118.

S. P. as in Southcote's Case, (post.)

Denied in Foster v. The Essex Bank, 17 Mass. 499. *et seq.*

1359. KINDER & al. v. SHAW & al. 2 Mass. 398.

This case recognizes and adopts the doctrine of Patterson v. Tash, 2 Str. 1178, which is questioned in Pickering v. Bush, 15 East, 38, and Whitehead & al. v. Tucket, 15 East, 400.

1360. KIGHTLY v. KIGHTLY, 2 Ves. Jun. 328.

Denied in Williams v. Chitty, 3 Ves. 545, and in Sherratt v. Sherratt, 1 Coop. Sel. Ca. 35, (8 Cond. 372.)

1361. THE KING v. ABBOT, 3 Price, 178.

Doubted in The King v. Winstanley, 2 Y. & J. 124; Alexander, L. C. B.

1362. KING v. BALDWIN, 17 John. R. 386; (2 J. Ch. R. 554.) Paine v. Packard, 13 John. 174.

Denied in Warner v. Beardsly, 8 Wend. 198; by the Chancellor, who says " it also stands in opposition to the decisions of most, if not all of the states in the union, where the question has arisen."

1363. THE KING v. The Inhabitants of CLIVEGER, 2 Term. R. 263.

On an appeal against an order of removal, the respondents proved a marriage in fact between the paupers; and the appellants, called the husband to prove that he had a former wife living, but he denying the fact, they offered to call her for the purpose of proving it; but the court held her to be an incompetent witness, and the rule was founded on policy, which does not permit a wife to be called to give evidence that may *tend to criminate her husband.*

Doubted in Leox v. Bent, 5 Bing. 183 by Best, C. J. & Park, J.; & Abbott, C. J. in 2 B. & Ad. 639, says it is true in respect to a *direct* proceeding.

1364. KING v. EMONDS et al., 4 B. & A. 470.

Ch. J. Abbott held, that expressions used by a juryman, are not a cause of challenge, unless they are to be referred to something of personal ill will towards the party challenging.

Denied by Woodworth, J. in Ex parte Vermilyea, 6 Cow. R. 563, 4.

1365. THE KING v. ERISWELL, 3 Term 707.

On the question whether the deposition of a deceased witness, taken in the absence of the accused, is or is not admissible. The Court were divided.

Decided in The State v. Hills, 2 Hill's R. 607; King v. Smith, 1 Holt's R. 614; that the evidence was not admissible.

(See State v. Ferguson, ib. p. 619).

1366. THE KING v. HARDWICK, 11 East, 578.

The admissions of a parishioner, liable to be assessed for taxes, was received, on the ground that the parish was an aggregate corporation of which he was a member.

Doubted in Osgood v. Manhattan Co., 3 Cowen, 623. And overruled in 3 Day, 493.

1367. KING v. MAWBREY et al., 6 T. R. 638.

Ld. Kenyon says—"In one class of offences, indeed, those greater than misdemeanors, *no new trial can be granted at all;* but in misdemeanors there is no authority to shew that we cannot grant a new trial, in order that the guilt or innocence of those who may have been convicted may again be examined into."

Limited in The People v. Comstock, 8 Wend. 549 to cases, "where the defendant has been improperly *convicted*, but not where he has been *acquitted*, even in misdemeanors.

1368. KING v. MIDDLEZOY, 2 Term R. 41.

It was a case of settlement, where the respondents had given notice to the appellants to produce an indenture of apprenticeship, by which the pauper was bound to the appellant parish, and which indenture was accordingly produced at the trial of the appeal, the Court of K. B. held, that the court below ought not to have required the respondents to prove the execution, but that the indenture should have been admitted prima facie as duly executed.

Overruled it was said by Ld. Ellenborough, C. J. in Gordon v. Secretan, 8 East, 548. The correct principle is stated by Phillips 1 vol. p. 450. Thus: "When a party to a suit in pursuance of a notice, produces an instrument, to which he is a party, and under which he claims a beneficial interest, it will not be necessary that the other party should call an attesting witness to prove the execution; "but (adds Mr. J. Spencer in Jackson v. Kingsley, 17 John. R. 159) that in other cases, the execution ought to be regularly proved by the party who offers the instrument as part of his evidence in the cause." This is now, the settled law upon the subject, with this qualification, that it is immaterial whether the party who calls for the production of the deed be a party or a stranger to it, ib. See further observations of Mr. J. Washington, 4 Wash. C. C. R. 719.

1369. THE KING v. MOUNTSORREL, 3 M. & S. 497; The King v. Great Wigston, 3 B. & C. 484; The King v. Chillesford, 4 ib. 94; Lewin, 247.

That a child may bind himself without his father's concurrence.

Oppo. Pierce v. Massenburgh, 4 Leigh R. 493.

1370. THE KING v. RATCLIFFE, 1 W. Bl. 3, 4, 5; 1 Wils. 150.

The affidavit of a prisoner on account of the absence of a witness must shew merits positively.

Overruled, Cookson v. Simpson, 1 Chit. R. 686, note (a). The late practice in C. B. merely requires the affidavit to state in what respect the evidence is material. Tidd Pr. 708; 16 Mass. 374.

1371. KING v. RENNETT, 2 T. R. 197.

Overruled in The King v. Bonsall, 3 B. & C. 173. See King v. Turner, 1 M. & K. 456. See Right v. Banks, 3 B. & Ad. 664.

1372. KING v. MELLING, Ventr. 230.

"——" is very imperfect in Ventris, especially as to the cases said to have been cited by Hale." Per Ld. Hardwicke, 3 Atk. 796.

1373. THE KING v. THE SHERIFF OF H., cited in Dealy v. Clark, 1 B. & Ad. 677.

Motion for a prohibition upon the sheriff, &c. from proceeding in two suits in his county court, in cases in which plaintiff as carrier had conveyed goods for defendant to amount of £1 4s.: and in a month after had carried to a similar amount; and the plaintiff brought two actions:—Held, that this was not within the principle of splitting a cause of action into several portions; for here each is distinct, and one has no connection with the other.

Doubted; for the court has a discretion to *compel* a consolidation of several suits, upon several distinct demands; and when such application is granted, the costs are to be paid by the plaintiff; for the practice is considered oppressive and vexatious. 2 T. R. 639; Com. Dig. Action, 1.

1374. KING v. THORN, 1 D. & E. 489.

Same rule as in Cockerill v. Kynaston, ante.

Denied in Henshall v. Roberts, 5 East, 150.

1375. KING v. TURNER, 2 Simons, 545.

Overruled in S. C. 1 Myl. & Keene, 456:—Held, that the heir may, without admittance, devise copyhold estates descended upon him.

1376. KING v. WATSON, 3 Price, 6.

Denied by Mr. J. Sutherland in Grover v. Wakeman, 11 Wend. 198;

'The case, however, is a very bald one, and is entitled to very little weight as an authority.'

1377. KINGDON, *devisee*, v. NOTTLE, 4 M. & Selw. 53.

Covenant lies by devisee of lands in fee upon a covenant made by defendant to the testator, to whom defendant conveyed the lands in fee, that defendant was lawfully seised, &c., and had a good right to convey, &c.; for such covenant runs with the land, and though broken in the life time of the testator, is a continuing breach in the time of the devisee, and it is sufficient to allege that thereby the lands were of less value to the devisee, and that he is prevented from selling them so advantageously.

Denied in Mitchell v. Warner, 5 Conn. R. 504.

1378. KINGDON Exr. v. NOTTLE, 1 M. & Selw. 355.

Defendant had conveyed to K., the testator, certain property, and covenanted that he was seised of it, and had good right to convey. It was averred as a breach, that he was not seised of the premises; *held*, that the executor could not sue on the covenant, without special damage to the testator, but that the heir might.

Denied in Mitchell v. Warner, 5 Conn. R. 504, *et seq.*—Hosmer, C. J.:—"The damage is the *consideration paid*; and this is immediate on the delivery of the deed."

1379. KINGSBURY v. COLLINS, 4 Bing. 202.

The C. B. allowed the right to emblements of teazles.

Doubted in Graves v. Weld, 5 B. & Ad. 105; the right is confined to things yielding present annual profit; and to that year's crop, which is growing when the interest determines; the principle being, the recompense for which cost or labor is to arise, *in the shape of a crop*, is confined to the same year in which there is an outlay of cost or labor.

1380. KINNERSLY v. ORPE, 1 Doug. 517.

Denied in Case v. Reeve, 14 John. R. 82; Spencer, J. and by Ld. Ellenborough in Outram v. Morewood, 3 East, 346, 366.

1381. KIRBY v. HANSAKER, Cro. Jac. 315.

Eviction by elder title must be averred and proved in an action of covenant upon general warranty; because if the plaintiff aver that he was evicted by one having a good or a better title, if it is not also alleged that he had an elder title, it might be that he derived it from the plaintiff himself, after the deed.

Limited in Curtis v. Deering, 3 Fairf. R. 501:—"There is no propriety in applying the rule, that there should be proof of elder title,

to evictions founded upon the subsequent acts of the covenantor, which cannot be resisted."

1382. KITCHIN v. BLANCHARD, 1 B. & P. 378.

That a defendant cannot demand a bill of particulars, till after he has appeared to the action.

Denied in Derry v. Lloyd, 1 Chit. R. 724, and in Roosevelt v. Gardinier, 2 Cowen, 463.

1383. KITSON v. FLAGG, 1 Str. 60; 10 Mod. 288.

Denied per Ld. Mansfield, in Harris v. Ashley, M. 30 G. 2. B. R.

1384. KLINE v. BEEBEE, 6 Conn. 493; 2 Kent Com. 195; Holmes v. Blagg, 8 Taunt. 35. 39, 40.—

Seem to hold that the omission on the part of an infant on coming of age, to disaffirm a contract within a reasonable time, shall be taken as sufficient evidence of ratification.

Oppo. Thompson et al. v. Lay et ux., 4 Pick. 48; Whitney v. Dutch, 14 Mass. 460; Ford v. Phillipps, 1 Pick. 203.

1385. KNICKERBOCKER v. HARRIS, 1 Paige Ch. R. 209.

Reversed in 5 Wend. 638.

1386. KNIGHTS v. PUTNAM, 3 Pick. 184.

That the indorser could not be a witness to qualify his indorsement by establishing an interest in himself; the indorsement being unqualified.

Denied it seems in Adams et al. v. Carver et al., 6 Greenl. R. 392, 3: Held, that such indorser was competent to prove the time of indorsement and facts *prior* not affecting the original validity of the note.

1387. KNIVETON v. LATHAM, Cro. Car. 490.

Berkely, J. held, that the giving a discharge of an entire bond, viz. of the penalty after the payment of principal, interest, and damages, was a devastavit.

Denied in Pennington, 3 Tyrw. Exch. R. 322; Bayley, B.:—"That is too strong a position."

1388. KULEN v. VIGNE, 1 D. & E. 304.

Recognizes the validity of a wager policy; which the courts of Massachusetts do not. Amory v. Gillman, 2 Mass. 1.

1389. LACAUSSADE v. WHITE, 7 D. & E. 535.

'That whenever money has been paid upon an illegal consideration it may be recovered back again.

Denied per Parker, C. J. in Worcester v. Eaton, 11 Mass. 368; How-

son v. Hancock, 8 D. & E. 575; Aubert v. Walsh, 3 Taunt. 277; and Per Kent, C. J. in Vischer v. Yates, 11 J. R. 31.

1390. LACKER v. HARCOURT, 1 Show. 148; Carth. 126; Holt, 76.

Overruled. Wigley v. Morgan, Ca. temp. Hardw. 285.

1391. LADY CLIFFORD v. EARL OF BURLINGTON, 2 Vern. 379.

Doubted in Evelyn v. Evelyn, 2 P. Wms. 648; but was confirmed, 2 Atk. 342; Vid. Sug. on Powers, p. 131, n. (c).

1392. LAIDLAW v. ORGAN, 2 Wh. R. 178.

Doubted in Lapish v. Wells, 6 Greenl. 188, 9; "That case seems to us to go as far as moral principles will justify, even in cases of that description, depending on public intelligence; and further than the same court seemed willing to go in the case of Elting v. Bank of U. S., 11 Wh. 59."

1393. LAMBERT v. OAKES, 1 Ld. Raym. 433; 12 Mod. 244; Lambert v. Pack, 1 Salk. 127, pl. 9.

That in an action on a bill of exchange, it is necessary to prove a demand on the drawer.

This doctrine is exploded, vid. Bromley v. Frazier, 1 Str. 441; Heylyn v. Adamson, 2 Burr. 669. 678.

1394. LAMBERT v. The PEOPLE, 7 Cowen, 166.

Reversed in 9 Cowen, 578.

1395. LAMPLEY v. THOMAS, 1 Wils. 193.

Overruled. Perry v. Jones, 2 Doug. 213.

1396. LAMPEN v. HATCH, 2 Str. 934.

That a judgment cannot be reversed in part and affirmed in part.

Overruled in Kent v. Kent, 2 Str. 971; vid. also Waite v. Garland, 7 Mass. 443, and Cutting v. Williams, ante.

1397. LANCASTER v. GREAVES, 9 B. & C. 628; Crepps v. Durden et al., Cowp. 640.

The last case decides, that a person can commit but one offence on the same day, by "exercising his ordinary calling on a Sunday," contrary to the statute 29 Car. 2, c. 7. And, if a justice of the peace proceed to convict him in more than one penalty for the same day, it is an excess of jurisdiction for which an action will lie, before the convictions are quashed.

Explained in Smith's L. Cas. p. 386, where is the following note:— "The rule is the same whether the conviction appears on the face of it to be for an offence not within the magistrate's jurisdiction, or be for an offence

within the magistrate's jurisdiction but defective for want of the circumstances necessary to a conviction for that offence; see Lancaster v. Greaves, 9 B. & C. 628; Morgan v. Hughes, 2 T. R. 225; Hardy v. Ryle, 9 B. & C. 603; Groome v. Forrester, 5 M. & S. 320; for, as was observed in Lancaster v. Greaves, though the conviction is conclusive upon matter of fact, and, if the defendant mean to rely on matter of fact, he should make his defence at the time, the rule is not so as to matter of law. But, "a conviction by a magistrate who has jurisdiction over the subject matter is, if no defects appear on the face of it; conclusive evidence of the facts, stated in it;" Brittain v. Kinnaird et al., 1 B. & B. 432; per Dallas, Ch. J. In that case trespass was brought against justices for taking a boat: in their defence they relied on a conviction which warranted them in doing so. The plaintiff offered evidence to controvert the facts stated in the conviction, but it was held not to be admissible. Accord. Basten v. Carew, 3 B. & C. 649; Fawcett v. Fowles, 7 B. & C. 394; Gray v. Cookson, 16 East, 13; Lowther v. Earl Radnor, 8 East, 113; Ashcroft v. Bourne, 3 B. & Ad. 684; and the same attribute, viz., that of being conclusive evidence of the facts stated therein, and properly tending thereto, seems to belong to every adjudication emanating from a competent tribunal; Aldridge v. Haines, 2 B. & Ad. 395; and the cases cited by Coleridge, arguendo.

Even when the conviction had been quashed, the party convicted, in an action against the justices, which must be on the case, will only obtain two pence damages, besides the amount of the penalty if levied, and no costs of suit, unless he expressly aver malice and want of probable cause; nor will he recover the amount of the penalty if the defendant prove him to have been guilty of the offence of which he has been convicted, and that he has undergone no greater punishment than is by law assigned thereto, st. 43 G. 3, c. 141. And he must at the trial prove not merely his own innocence of the offence of which he was convicted, but also what took place before the justice at the time of conviction, in order that it may appear whether there was probable cause or no. Burley v. Bethune, 5 Taunt. 580.

The conviction may be drawn up at any time before it is returned to the quarter-sessions, so that, though it may be informal at first, the magistrate has an opportunity of amending it, and it has been declared to be not only legal but laudable so to do, Rex v. Barker, 1 East, 186. But the rule is different in case of an order; Rex v. Justices of Cheshire, 5 B. & Ad. 439."

1398. LAND v. HULLS, 5 Esp. 156,

A copy of a notice is not admissible without a notice to produce the original.

Oppo. Ackland v. Pearce, 2 Camp. 601; 7 B. Moore, 112; Colling v. Tweek, 6 B. & C. 394; Smyth v. Hawthorn, 3 Rawle, 358.

1399. LANDIS v. URIE, 10 S. & R. 321.

Overruling the point in Clark v. Hering, 5 Binn. 33, that assumpsit will lie on a promise to pay the money secured by an obligation. Duncan, J. observes:—"I cannot assent to this unless there is a new consideration, as forbearance," &c. See Cro. Car. 343, and Fenner v. Mears, (post).

1400. LANFEAR v. SUMNER, 17 Mass. 110.

Was a case of the assignment of property at sea; held, that an at-

taching creditor should hold, in preference to the assignee, although he was not guilty of negligence in getting possession of it, after its arrival in port.

Denied in Ingraham v. Wheeler, 6 Conn. 284, and Ricker v. Cross, 5 N. H. R. 573.

1401. LANGFORT v. TYLER, 1 Salk. 113.

That the vendor of goods may resell and elect to consider the contract rescinded, if the vendee do not come and pay for them and take them away in a reasonable time.

Overruled in Greaves v. Ashlin, 3 Camp. 426.

1402. LANSDOWNE v. LANSDOWNE, Moseley's R. 364; 2 Jac. & Walk. 205.

The second of four brothers died seized of land, and the eldest entered upon it; but the youngest having also claimed it, they applied to a school master, who often acted as attorney, for his opinion, and he, upon consulting his books, gave an opinion in favor of the youngest, on the ground that lands could not *ascend*; upon which the eldest brother, rather than go to law, agreed to divide the estate, and deeds were executed accordingly; but Chancellor King, decreed that the deeds should be delivered up and cancelled, as having been obtained by mistake, and misrepresentation.

Doubted in 1 Story's Eq. 129, 136, 141 n. (1) and cases cited. But see Lawrence v. Beaubien, 2 Bayl. R. 623.

1403. LANSING v. FLEET, 2 J. Cas. 13, Per Kent J.; ib. 15 Per Benson, J.; and Spencer, J. in 15 John. R. 259.

That where there has been a voluntary return, there must be notice given by the plaintiff of his election to hold, or the sheriff cannot detain the prisoner.

Denied in Carthane & al. v. Clarke, 5 Leigh R. 288, as not supported by the cases cited.

1404. LANSING v. M'KILLIP, 3 Cai. R. 286.

The Court in Jerome v. Whitney, 7 J. R. 323, say, 'whatever may have been the true import of that decision the court cannot consistently say, that the acknowledgment of value received is not evidence of consideration in a note, as well as in a deed.'

1405. LANSING v. MONTGOMERY, 2 John. R. 383.

An estoppel cannot be taken by inference but must be relied on in pleading.

Oppo. Adams v. Barnes, 17 Mass. 368, 369; Howard v. Mitchell, 14 Mass. 241.

1406. LANSING v. LANSING, 18 J. R. 503.

Explained and qualified in The People v. The Judges of Erie, 4 Cowen, 445.

1407. LANUSE v. BARKER, 10 John. R. 312.

Reversed in U. S. Court, 3 Wheat. R. 101.

1408. LARGAN v. BOWEN, 1 Scho. & Lef. 296.

Is not to be reconciled with the law of the court; it is not an authority by which the court will be governed. White v. Westmeath, 2 Moll. Ch. R. 128. 133.

1409. LARNED v. BUFFINGTON, 3 Mass. 546.

Denied in Alderman v. French, 1 Pick. 19, as to the dictum of C. J. Parsons that if defendant had been led into the belief that plaintiff was guilty of the slander imputed, by the misconduct of plaintiff, that might be shown in evidence.

1410. LASSEL v. REED, 6 Greenl. 222.

Limited in Staples v. Emery, 7 Greenl. 202, 204:—"We do not mean to extend the principle of that decision beyond the peculiar facts."

1411. LATHAM v. EDGERTON, 9 Cowen, 227.

Doubted in Van Deusen et al. v. Hayward et al., 17 Wend. 67—Bronson.

1412. LATOUCHE v. DUNSANY, 1 Scho. & Lef. 137.

The dictum of Ld. Redesdale had a great influence; but the reasoning in Darcy v. Chambers of the Chief Baron, in opposition to it, appears to be both ingenious and sound. Brown v. Blake, 1 Moll. Ch. R. 386.

1413. LAW v. HODGSON, 2 Camp. 147.

Distinction. In Foster v. Taylor, 4 Nev. & Man. 255—Littledale—"It is necessary, however, to notice one point arising out of this act of parliament, that the penalty is given in the clause which directs the thing to be done, subject to a penalty, and not absolutely; and in Law v. Hodgson, the case most frequently referred to of late on these subjects, Lord Ellenborough notices that the penalty is given in a separate clause."—But he adds—"in many of the cases which have occurred, the penalty is given in the same clause."

1414. LAW v. IBBOTSON, 5 Burr. 2722.

Overruled in Williamston v. Allot, Cowp. 429; 5 Burr. 2725. S. C. and Wynn v. Smithies, 6 Taunt. 198.

1415. LAWLEY v. HOOPER, 3 Atk. 278.

Not accurately stated in Atkyns. Vid. M'Ghee v. Morgan, 2 Scho. & Lef. 395, note.

1416. LAWRENSON v. BUTLER, 1 Scho. & Lef. 13.

It is not a sufficient memorandum within the statute if signed by the purchaser at auction alone, for want of mutuality.

Overruled in Laythoarp v. Bryant, 2 Bing. N. C. 736, *and cases cited.*

1417. LAWSON v. COPELAND, 2 Bro. C. C. 156.

That case would not stand now. It has long been repudiated. Travers v. Townsend, 1 Moll. Ch. R. 498.

1418. LAWSON v. LAWSON, 1 P. Wms. 441.

—— as to donatio mortis causa. Vid. Tate v. Hilbert, 2 Ves. Jr. 120; where this is contradicted by reference to the Register's book.

1419. LAWSON v. WESTON, 4 Esp. R. 56.

Overruled in Gill v. Cubitt, 3 B. & C. 466. Sed see the observations upon the principle of this decision in Crook v. Jadis, 5 B. & Ad. 909. (see Gill v. Cubitt,) (ante).

1420. LAXTON v. PEAT, 2 Camp. 445.

The drawer was considered the principal debtor and the acceptor as a surety.

Overruled in Fentum v. Pocock, 1 Marsh. 16; 5 Taunt. 192; Yallop v. Ebers, 1 B. & Adol. 703; See Murray v. Judah, 6 Cowen, 492.

1421. LEAME v. BRAY, 3 East, 593.

That if the defendant be the immediate cause of the injury, whether wilfully or not, trespass, and not case, is the proper remedy.

The correctness of this decision has been doubted in two subsequent cases in C. B. Rogers v. Imbleton, 2 New Rep. 117, and Haggett v. Montgomery, ib. 446.—But in Covil v. Laming, 1 Camp. 497, Ld. Ellenborough adhered to the doctrine of Leame v. Bray, vid. also Barnes v. Hurd, 11 Mass. 57.

1422. LEARMAN v. CASTELL, 1 Esp. R. 270.

That a master is liable on an implied assumpsit to pay for medical attendance on his servant.

Oppo. Newbury v. Wiltshire, 2 Esp. 739; Wennall v. Adney, 3 B. & P. 247; Clark v. Waterman, 7 Verm. R. 76.

1423. LEAPER v. TATTON, 16 East, 420.

'*He had* been liable, but *was not then*, because it was out of date.' Held, sufficient to take the debt out of the statute.

Overruled in Rowcroft v. Lomas, 4 M. & S. 458; Clemenston v. Williams, 8 Cranch, 74; Danforth v. Culver, 11 J. R. 146; Murray v. Tilby, 5 Binn. R. 576; Perley v. Little, 3 Greenl. R. 101.—Mellen, C. J.; Sands v. Gelston, 15 J. R. 511.

1424. LE BRET v. PAPILLON, 4 East, 502. 509.

The like point as in Charnley v. Winstanley, ante.

1425. LECHMERE v. LORD CARLISLE, 3 P. Wms. 215.

Denied in Pentland v. Stokes, 2 Ball & Beat. 74:—"And the opinion of Sir Joseph Jekyll, in Lechmere v. Lord Carlisle: 'That the forbearance of trustees in not doing what it was their office to have done, shall in no sort prejudice the *cestui que trusts*,' if it could apply, has been often denied, and it is contrary to many decisions."

1426. LECHMERE v. THOROWGOOD, 2 Jac. 2; 2 Vent. 159; 4 Jac. 2; 3 Mod. 236; Comb. 123; 1 Show. 12.

In an action of trespass, by assignees of a bankrupt against a sheriff, who had seized goods under a *fi. fa.*, after a secret act of bankruptcy, the sheriff could not be made a trespasser by relation.

Denied in Giles v. Glover, 6 Bligh's P. R. 302.—Patteson, J.—as to what Comb. makes Ld. Holt to say, "The property in goods is vested by the delivery of the *fi. fa.*" &c.—"is best reported in 1 Show. 12, and this report—is the only clear state of it in any of the reports." 1 Burr. 35. See Garland v. Carlisle, 3 Tyrwh. R. 725. 735.

1427. LEE AND LIBB, Carthew.

Overruled in Simeon v. Simeon, 4 Sim. 555; Sugd. on Pow. p. 302. n. (1).

1428. LEE v. RISDON, 7 Taunt. 191; 2 Marsh. 495. S. C.

Fixtures while affixed to the freehold, cannot be considered as goods and chattels in an action for the price.

In Pitt v. Shew, 4 B. & Ald. 206, they were held to fall under the description of "goods, chattels and effects," in an action of trespass. See Hallen v. Runder, 3 Tyr. 966, Parke B. said—"we cannot consider that previous authority overruled, because in the latter case it is probable that the articles taken had been severed from the freehold before the sale by the defendant, though Ld. Ch. J. Abbott certainly does not mention that circumstance as the ground of decision." In Hallen v. Runder, where a short time before the expiration of a lease of a house, the landlord agreed to purchase the tenant's fixtures at a valu-

ation. The lease expired, and the tenant having quitted possession of the premises without severing the fixtures, sent the key to the landlord. The broker appointed by the latter afterwards appraised the fixtures at more than 10*l.* and signed the valuation. Held, that the plaintiff having at the defendant's request waived his right to remove the fixtures, the matter bargained for was not an interest in land, and the plaintiff was entitled to recover them in assumpsit, without proving a note, &c. in writing. See Twigg v. Potts, 3 Tyrw. R. 969 ; Boydell v. M'Michael, 3 Tyrw. R. 974 ; See p. 976. n. (a).

1429. LEECH v. COLE, Cro. El. 670.

Overruled, Page v. Hayward, Pigot on Recov. 176; Martin v. Strahan, Willes, 444; Doe v. Nelson, 2 Taunt. 60.

1430. LEER v. YATES, 3 Taunt. 387 ; S. P. Holt's R. 36, n.

A general ship took brandies on board, under bills of lading, which allowed 20 days for delivery of the goods in London, and stipulated for £4 *per* day demurrage afterwards. Certain of the consignees choosing to have their goods bonded, the vessel could not make her delivery at the London docks until 46 days after the 20 days ; some of the goods which were undermost, could not, though demanded, be taken out till the upper tiers were cleared: *held*, that the consignee was liable, on a general count in assumpsit for demurrage, to pay the £4 *per* day for the 46 days.

Overruled in Rogers v. Hunter, Ry. & M. 61; 2 C. & P. 601, S. C. —Tenterden. Dobson v. Droop, 4 C. & P. 112 ; M. & M. 441.— Tenterden.

1431. LEES v. SUMMERSGILL, 17 Ves. 508.

That the 25 Geo. 2. c. 6. extended to all wills, and therefore, that a legacy, given by a will of mere personalty to a person who was a subscribing witness, was void.

Overruled in Emanuel v. Constable, 3 Russ. R. 436.

1432. LEE AND WIFE v. COLESHILL, Cro. Eliz. 529.

See S. C. 2 Anderson, *nom.* Smyth v. Cotshill.

Doubted in No. 20. (Oct. 1833) Amer. Jurist, p. 242. See Norton v. Simmes, (post).

1433. LEFTLY v. MILLS, 4 Term, 170.

Limited in Greeley et al. v. Thurston, 4 Greenl. 481; the court "adopt the views of Mr. J. Buller, and it is our opinion that bills of exchange and negotiable notes, should be paid on demand, if made at a reasonable hour, on the day they fall due ; and if not then paid, that the acceptor or maker may be sued on that day, and the indorser and dwawer also, after notice given, or duly forwarded."—"But notes of

hand and bills of exchange, like other instruments, are not suable until the day of maturity be passed, unless *demanded on that day.*" See also to the same effect, 1 Pick. 401, and 3 Pick. 414.

1434. LEGACIES—Cases in Chronological order where legacies by different instruments have been held *accumulative.*

Wallop v. Hewit, 2 Ch. R. 37; Windham v. Windham, Finch, 267; Newport v. Kynaston, ib. 295; Cliffe v. Gibbons, 2 Ld. Raym. 1324; Pitt v. Pidgeon, Chan. Cas. 301; Masters v. Masters, 1 P. Wms. 423; Foy v. Foy, 1 Cox, 163; Wright v. Englefield, Amb. 468; Hooley v. Hutton, 1 Bro. C. C. 398, n.; 2 Dickson, 461; Redges v. Morrison, 1 Bro. C. C. 389; Curry v. Pile, 2 Bro. C. C. 225; Baille v. Butterfield, 1 Cox, 392; Hodges v. Peacock, 3 Ves. jun. 735; Benyon v. Benyon, 17 Ves. 34.

1435. LEGACIES—Cases in Chronological order where legacies by different instruments have been held *not accumulative.*

St. Alban's (Duke) v. Beauclerk, 2 Atk. 636; Greenwood v. Greenwood, 1 Bro. C. C. 30, n.; Garth v. Meyrick, ib.; Campbell v. Radnor, (Earl), ib. 271; Cooke v. Boyd, 2 Bro. C. 521; Jackson v. Jackson, 1 P. Wms. 423. n.; 2 Cox, 35; Maggridge v. Thackwell, 3 Bro. C. C. 517; James v. Semmens, 2 H. Black. 213; Allen v. Callow, 3 Ves. jun. 289; Barclay v. Wainwright, ib. 466; Holford v. Wood, 4 Ves. jun. 76; Osborne v. Leeds, (Duke) 5 Ves. jun. 369; Benyon v. Benyon, 17 Ves. jun. 34; Currie v. Pile, ib. 46; Att. Gen. v. Harley, 4 Madd. 263; Hurst v. Church, 5 Madd. 351; Gillespie v. Alexander, 1 Sim. & Stu. 145.

1436. LEGH v. LEGH, 1 B. & P. 447.

S. P. as in Andrews v. Beecker, (ante).

1437. LEICESTER (LORD) v. WALTER, 2 Camp. R. 251.

In action of defamation defendant was permitted to show in mitigation of damages, that before and at the time of the publication of the supposed libel, the plaintiff was generally suspected of the crime imputed to him.

Overruled in Jones v. Stevens, 11 Price, 235; See 2 Phill. Ev. p 250; Mapes v. Weeks, 4 Wend. 659; Bodwell v. Swan, 3 Pick. 378; Smith v. Buckecker, 4 Rawle, 296.

1438. LEIGH v. BRACE, Carth. 343; 1 Ld. Raym. 101; Holt, 668.

That conveyances by way of use, should be construed as wills, &c.

This case as reported by Carthew, is said to be "contrary to reason and common experience." Per Willes, C. J. in Tapner v. Merlock, Willes, 180.

It is better reported, 5 Mod. 266.

Misreported in Ld. Raymond's Reports; Hampson v. Brandwood, 1 Maddock Ch. Rep. 381.

1439. LEMAYNE v. STANLEY, 3 Lev. 1.

That sealing a will was sufficient signing, within the statute of frauds.

Denied in 1 Wils. 313, and per Willes, C. J. in 1 Ves. Jr. 13.

1440. LENOX v. GIBBES, 1 Dess. 305.

Doubted. Croft v. Adm. of Townsend, 3 Des. 234; See 1 Barb. Eq. Dig. 289.

1441. LENOX v. LEVERETT, 10 Mass. 1.

Held, that notice to the indorser of a foreign bill need not be accompanied by the protest.

Opposed. Blakely v. Grant, 6 Mass. 386; Poth. pl. 148; Robins v. Gibson, 1 M. & S. 288.

1442. LENOX v. ROBERTS, 2 Wheat. R. 373.

Held, that notice of non-payment of a bill or note must be sent by the *mail which goes on the day succeeding the demand.*

Overruled in Geill v. Jeremy, 1 Mo. & M. 61, and Bank of Alexandria v. Swann, 9 Pet. 33. The rule therefore is satisfied, if there be no post on the following day; the next post after the day of the demand; or, it seems the next post which goes after notice put into the post office on the next day, at *any time of the day.* See Firth v. Thrush, 8 B. & C. 287,

1443. 3 LEON. 231. pl. 313.

The words "thou hast forged my hand"—held not actionable.

Overruled in Jones v. Herne, 2 Wils. 87.

1444. 4 LEON. 9. pl. 39.

That if one had been apprentice 7 years at *any* trade mentioned in 5 Eliz. c. 4. he may exercise *every* trade named in the statute.

Denied by Ld. Mansfield, Raynard v. Chase, 1 Burr. 2; 2 Wils. 40.

1445. LEONARD'S REPORTS.

'Leonard's Reports were always in high estimation.' Sug. on Pow. p. 16. (No. 6.)

1446. LESTER v. GARLAND, 15 Ves. 248.

As to the computation of time; no general rule is necessary: cases would occur, the reason of which would require exceptions to be made.

Explained in Ex parte Dean, 2 Cowen, 605, and note; and Jackson, J. in 15 Mass. 193, and in 4 N. H. R. 276, *et seq.*

1447. LESTER v. GRAHAM, 1 Const. R. 182.

S. P. as in Timrod v. Shoolbred, (post).

1448. LETCHER v. THE BANK OF THE COMMONWEALTH, 3 J. J. Marsh. R. 195.

Error in the Report corrected in S. C. 1 Dana, 82.

1449. LETHULIER v. TRACY.

The reporters, 1 Barn. & Ald. 742, say, 'it appears probable that Fearne, and some other writers, who have discussed it, have been misled, by the inaccuracy and want of perspicuity in both Atkyns & Ambler's reports of it, into an important mistake.'

1450. LEVERICK v. MEIGS, 1 Cowen, 645.

S. P. as in Grove v. Dubois, (ante).

1451. LEVINZ'S REPORTS.

"Levinz, though a good lawyer, is sometimes a very careless reporter." Said per Ld. Hardwicke.

1452. LEVY v. WILSON, 5 Esp. R. 180.

Declaration alleging his proper hand being thereunto subscribed, proof of the hand writing of the party, indispensable.

Overruled in Booth v. Grove, 1 M. & M. 182; Jones v. Turnour, 4 C. & P. 204.

1453. LEWARD v. BASELY, 1 Ld. Raym. 62; 1 Salk. 407.

The master cannot justify an assault in defence of his servant, because the master may have an action *per quod servitium amisit.*

Doubted. See 2 K. C. 261, and n. (b).

1454. LEWIS v. ENGLAND, 4 Bin. 5.

This case contradicts M'Laughlin v. Scot, 1 Bin. 61. where it is held that an award of costs by *referees* is good, though the principal sum reported by the referees as debt, if found by the *jury*, would be within the statute which forbids the allowance of costs.

But the principle of M'Laughlin v. Scot is the law of Massachusetts. Vid. Nelson v. Andrews, 2 Mass. 164.

1455. LEWIS v. HANCOCK, 11 Mass. 72; Packet, 3 Mason R. 255; S. P. 7 Cowen, 670.

Held, that the master of a vessel had a lien on the freight for his own wages as well as for advances, and that the owner had no right to receive the freight money from the shipper until the master's wages were paid.

Denied in Van Bokelin v. Ingersoll, 5 Wend. 315, overruling the decision of the Supreme Court.

1456. LEWIS v. LEE, 3 B. & C. 291.

That coverture is a good plea, notwithstanding a divorce a *mensa et thoro*.

Denied in Dean v. Richmond, 5 Pick. 467, as applicable to Massachusetts.

1457. LEWIS v. PIERCY, 1 H. Bl. c. 29. n.

Overruled in Ex parte Charles, 14 East, 197, and Walker v. Barnes, 5 Taunt. 778.

1458. LEWIS v. SMITH, 2 S. & R. 142.

Denied in Thompson v. Phillips, 1 Baldw. R. 276. and n. (a) and *cases cited*.

1459. *LEWIS' CASE*, 2 C. & P. 628.

A cellar window which was boarded up, had in it an aperture to let light into the cellar, and through this one of the prisoners thrust his head, and by the aid of the others thus entered the house; held, that it was not burglary.

Oppo. Commmonwealth v. Stephenson, 8 Pick. 354: "The offence consists in violating the common security of a dwelling-house in the night time, for the purpose of committing a felony—shutting the window blinds and leaving the windows open for air, is a common mode of closing a house in the warm season; if the blinds are forced, it is a 'breaking.'" So, lowering himself in a chimney. Brice's case, Russ. & Ry. 450.

1460. LEYFORD'S CASE, 10 Coke, 94, 5.

That the want of profert of a specialty is cause of general demurrer. Denied in 2 J. J. Marsh. R. 271.

1461. LIBER v. PARSONS, 1 Bay's R. 19.

The value of lands at the time of *eviction*, is the true rule of estimating damages.

Overruled in Furman v. Elmore, 2 N. & M'Cord, 189; Henning v. Withers, 2 Const. R. 584; Ware v. Weathnall, 2 M'Cord, 413.

1462. LICKBARROW v. MASON, 2 T. R. 63.

Though the consignee named in the bill of lading should become insolvent, without having paid for the goods, yet his assignment made for a valuable consideration, and without notice to the assignee, that the goods were not paid for, or that they were paid for by bills sure to be dishonored, has been held to pass them absolutely to his assignee, and

deprived the consignor of his right to stop *in transitu*, which, as against the original consignee, he might have exercised.

Reversed in Error. 1 H. Bl. 357; and error brought on the reversal in *Dom Proc.* and the cause directed to be tried anew, which it was, and adjudged as at first, 5 T. R. 683, which judgment was acquiesced in. See Newson v. Thornton, 6 East, 17; Solomons v. Nissen, 2 T. R. 674; Dick v. Lumsden, Peake N. P. C. 190; Haille v. Smith, 1 B. & P. 563, and See st. G. 4. c. 94; 9 East, 506.

In Smith's L. Cases, p. 433, are the following observations upon this subject.

"The second vendee of a chattel cannot, generally speaking, stand in a better situation than his immediate vendor. Small v. Moate, 9 Bing. 574. If, therefore, the vendee sell the goods before they have been delivered to him, he sells them, generally speaking, subject to the vendor's right to stop in transitu. Dixon v. Yates, 5 B. & Ad. 313. But on this rule the principal case has ingrafted an exception; for the second and main point in Lickbarrow v. Mason is, that the vendee may, by negotiating the bill of lading to a bona fide transferee, defeat the vendor's right to stop in transitu. A succinct history of the law on this point is given by Lord Tenterden, in his admirable work on Shipping, p. 388, where he remarks, that "the earliest mention of the subject in our law books is the case of Evans v. Martlett, 1 Lord Raym. 271; 12 Mod. 156; in which Holt, C. J., said 'the consignee of a bill of lading has such a property, that he may assign it over:' and Shower said 'that it had been adjudged so in the Exchequer.' But, in that case, the effect of such an assignment was not properly before the court, and does not appear to have been discussed or argued; and the case supposed to be referred to by Shower has not been found. In the case of Snee v. Prescott, 1 Atk. 246, the right of the pawnee of the bill of lading as against the consignor was not noticed or insisted upon." He then proceeds to comment on the cases of Wright v. Campbell, 4 Burr. 2046; 1 Bl. 628; Hibbert v. Carter, 1 T. R. 745; Caldwell v. Ball, ib. 205; and Lickbarrow v. Mason; and concludes by stating that "that cause was tried again, and that the Court of King's Bench, at the head of which Lord Kenyon had in the mean time been placed, and who had, in another cause, expressed his approbation of the first judgment in this case, as being founded on principles of justice and common honesty, again decided the case without argument, in conformity to the first decision of that court; 5 T. R. 683; and, in order that the question might again be carried to the other tribunals, another writ of error was brought; but it was afterwards abandoned, and it is now the admitted doctrine in our courts that the consignee may, under the circumstances before stated, confer an absolute right and property upon a third person, indefeasible by any claim on the part of the consignor."

But if the assignee of a bill of lading act *mala fide:* for instance, if he know that the consignee of the goods was insolvent, and took the assignment of the bill of lading for the purpose of defeating the right to stop *in transitu*, and so defrauding the consignor out of the price, he will be held to stand in the same situation as the consignee; and the consignor will preserve his right of stoppage. Per Lord Ellenborough, delivering judgment in Cumming v. Brown, 9 East, 514. And if the bill of lading contain a condition, *ex. gr.*, if it be indorsed upon it, that the goods are to be delivered, provided E. F. pay a certain draft, every indorsee takes it, subject to that condition, and will have no title to the goods, unless it be performed. Barrow v. Coles, 3 Camp. 92.

A factor, however, to whom goods were consigned, stood in a different situation from a vendee with respect to his power to pass the property therein by an indorsement of the bill of lading. For, though he might bind his principal by a sale thereof, he could not by a pledge, that not being within the usual scope of his authority. Martini v. Coles, 1 M. & S. 140; Shipley v. Kymer, Ibid. 484; Newsom v. Thornton, 6 East, 17. But by the statute 4 G. 4, c. 83, amended by 6 G. 4, c. 94, usually called the Factor's Act, the law upon this subject was altered. By that statute, sec. 2, a person intrusted with, or in possession of, any bill of lading, is to be deemed the true owner of the goods described in it, so far as to give validity to any contract made by him, for the sale or disposition of the goods, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money, or negotiable instrument, provided the buyer, disponee, or pawnee, have no notice by the bill, or otherwise that he was not the actual bona fide owner of the goods. But, by sec. 3, if the deposit or pledge be as a security for a pre-existing demand, the depositee or pawnee acquires only the same interest in them that was possessed by the person making the deposit or pledge. Section 5 enacts that any person may accept any such goods or documents as aforesaid, on deposit or pledge, from any factor or agent, notwithstanding he shall have notice that the party is a factor or agent; but in such case he shall acquire such interest, and no further or other, than was possessed by the factor or agent at the time of the deposit or pledge; and, therefore, in this last case, if the agent's interest be defeasible, so is the pledgee's. Blandy v. Allen, Dans & Lloyd, 22; Fletcher v. Heath, 7 B. & C. 517. A fraudulent sale cannot be upheld as a pledge under this section. Thompson v. Farmer, 1 M. & M. 48.

In cases where a bill of lading may be, and has been, pledged by the consignee of the goods, as a security for his own debt, the legal right to the possession of the goods passes to the pledgee; but the right to stop them in transitu, in case the consignee should become insolvent, is not absolutely defeated, as it is in the case of a sale of the bill of lading by the consignee; for the vendor may still resume his interest in them, subject to the rights of the pledgee, and will have a right, at least in equity, to the residue which may remain, after the satisfying the pledgee's claim. And further, if the goods comprised within the bill of lading be pledged along with other goods belonging to the pledger himself, the vendor will have a right to have all the pledger's own goods appropriated to the discharge of the pledgee's claim before any of the goods comprised within the bill of lading are so. This was decided *In re* Westzinthus, 5 B. & Ad. 817."

1463. LICKBARROW v. MASON, 2 T. R. 63; 1 H. Bl. 357; and 6 East, 21.

The unpaid vendor may, in case of the vendee's insolvency, stop the goods sold, *in transitu*.

Limited in Siffken v. Wray, 6 East, 376, where it was held, that the person who stops *in transitu*, must be a consignor; a mere surety for the price has no right to do so. But a commission merchant residing abroad, who purchases goods for a correspondent in England, whom he charges with a commission on the price, but whose name is unknown to those from whom he makes the purchases, may stop the goods *in transitu* if his correspondent fail while they are on their passage. Feise v. Wray, 1 East, 93; See Newson v. Thornton, 6 ib. 17.

The goods are *in transitu* so long as they are in the hands of the carrier as such, and so long as they remain in any place of deposit connected with their transmission. If after their arrival, however, at their place of destination, they be warehoused with the carrier, whose store the vendee uses as his own, or even if they be warehoused with the vendor himself, and rent be paid to him for them, that puts an end to the right to stop *in transitu*. See Nicholls v. Lefevre, 2 Bing. N. C. 83; James v. Griffin, 1 M. & Wels. 20; Coates v. Railton, 6 B. & C. 422; Foster v. Frampton, ib. 109; Allen v. Gripper, 2 Tyrwh. 217.

Whether *stoppage in transitu* rescinds the contract of sale altogether, or only puts the vendor in possession of a lien on the goods defeasible on payment of the price agreed on, is still undetermined. See Clay v. Harrison, 10 B. & C. 99; Stephens v. Wilkinson, 3 B. & Ad. 323; see Wiseman v. Vanderput, (post).

1464. LIFFORD'S CASE, 12 Jac. 1.

Overruled in Green v. Biddle, 8 Wheat. 75:—"The doctrine laid down in Lifford's case that the disseisee can maintain trespass only against the disseisor for the rents and profits, is, with great reason, overruled in the case of Holcomb v. Rawlins, Cro. Eliz. 540. In Bacon v. Sheppard, 6 Hals. 199, Ewing C. J. says, 'that Holcomb v. Rawlins was decided in the time of Elizabeth, and Lifford's case in the subsequent reign of James the first.'"

1465 LIGGINS v. INGE, 7 Bing. 692.—Tindal.

"Water flowing in a stream, it is well settled by the law of England, is *publici juris*. By the Roman law, running water, light, and air, were considered as some of those things which were *res communes*, and which were defined, things, the property of which belongs to no person, but the use to all. And by the law of England, the person who first appropriates any part of this water *flowing through his land* to his own use, has the right to the use of so much as he then appropriates, against *any other*.

Overruled or explained in Mason v. Hill, 5 B. & Ad. 1; 3 ib. 304 S. C.—Denman; who said: "that the first occupant (though he may be the proprietor of the land above) has (no) right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein." See also Bridges v. Purcell, 1 Dev. & B. 492—Gaston.

1466. LILLY'S REPORTS.

"A book of no great authority." Per Willes, C. J. Vid. Willes, 29.

1467. LINGAN v. CARROLL, 3 Harr. & M'Hen R. 333.

Doubted. See Green et al. v. Dennis, (ante).

1468. LIONEL WALDEN v. MITCHELL, 2 Ventr. 265.

"That where a man had been in an office of trust, to say that he behaved corruptly in it, as it imported great scandal, so it might prevent his coming into that, or the like office again, and therefore was actionable."

Denied by Ch. J. De Grey in Onslow v. Horne, 3 Wils. 188, (and Sutherland, J. 7 Wend. 208, *acc.*)

"I know of no case where an action for words was ever grounded upon eventual damages which may possibly happen to a man in a future situation notwithstanding what the Justice throws out in 2 Ventr. 266. I think the Ch. J. went too far."

1469. LISLE v. GREY, Sir Tho. Jones, 114.

Sir Tho. Jones says, that judgment in this case was for the defendant, but that is entirely a mistake. See 2 Atk. 574.

1470. LITTLE v. WESTON, 1 Mass. 156.

Note written "I promise," and signed by two; and held to be joint, and not joint and several.

Overruled in Hunt v. Adams, 5 Mass. 538.

1471. LITTLEFIELD v. STOREY, 3 J. R. 421.

S. P. as in Andrews v. Beecker, (ante).

1472. LITTLER v. HOLLAND, 3 T. R. 591.

S. P. as in Cuff v. Penn, (ante).

1473. LITTLEWOOD v. SMITH, Ld. Raym. 182.

Dictum of Treby, C. J.; and cited by Holroyd, J. in Mayfield v. Wadsley, 5 D. & R. 224; 3 B. & C. —

The sale of timber or growing underwood need not be in writing, because it is but a bare chattel.

Overruled in Scorell v. Boxall, 1 Y. & J. Exch. R. 396.

1474. LIVINGSTON v. PATRICK, 3 J. Cas. 293.

S. P. as in Mumford v. Church, (post).

1475. LIVINGSTON v. VAN INGEN, 9 John. R. 507.

Held, that the navigable waters within the territory of the respective States, were subject to the municipal regulations of the respective States, so as to authorize such States to grant the exclusive right of using and navigating *boats by steam* in the waters thereof.

Overruled in Gibbons v. Ogden, 9 Wh. R. 1; Steam Boat Co. v. Livingston, 3 Cowen, 747.

1476. LLEWELLYN v. WILLIAMS, Cro. Jac. 258.

Overruled in Pugh v. D. of Leeds, Cowp. 714. See Bacon v. Waller, (ante).

1477. LLOYD v. GREGORY, Cro. Car. 502; 2 Rol. Abr. 728. pl. 3.

"The note in Croke does not say a word of the only ground of the judgment." It is correctly reported in Sir Wm. Jones, 405; Vid. 3 Burr. 1806, 1807; Co. Lit. 45. a. n. 4.

1478. LLOYD v. HATCHETT, 2 Anstr. 527.

Oppo. Clarke v. Lord Abington, 17 Ves. 106:—Held, that interest will be given beyond the penalty of a bond, upon a mortgage for the same debt, though by a surety. See Hellen v. Ardley, 3 C. & P. 12, note; Eastmond v. Holl, 3 Price, 219; Potter v. Webb, 6 Greenl. 14.

1479. LLOYD v. JEWELL, 1 Greenl. 360.

Denied in Rice v. Goddard, 14 Pick. 293:—Held, where the note was given in consideration of the conveyance of land by deed with the usual covenants of seisin and warranty; and the title to the land failed entirely, that a total failure of title was a total failure of the consideration.

1480. LLOYD v. MAUND, 2 Term R. 760.

Held, that it was for the jury to decide what acts or declarations constitute a new promise, or acknowledgment.

Overruled in Bicknell v. Keppel, 1 New R. 20; Miller v. Lancaster, 4 Greenl. R. 161.

1481. LLOYD v. PEARSE, Cro. Jac. 424.

Several damages given on two issues, one of which was erroneous, and an entire judgment entered for both, and held that it must be reversed *in toto*.

Overruled in Henriquez v. Dutch W. I. Company, 2 Str. 807; Vid. Cutting v. Williams, ante.

1482. LLOYD v. WILLIAMS, Cas. Temp. Hard. 115; Bull. N. P. 236.

That a party who is named in the writ, and could not be taken, and proved to be concerned in the trespass, was an incompetent witness.

Overruled. Van Nuys v. Terhune, 3 J. Cas. 82; Stockham v. Jones, 10 John. R. 21.

1483. LLOYD'S CASE, 1 Camp. 260; Rugby Charity v. Merryweather, 11 East, 375, (n).

Whether a street which is not a *thoroughfare* can be deemed a highway; Lord Ellenborough and Lord Kenyon in favor.

Doubted in Woodyer v. Hadden, 5 Taunt. 126; Wood v. Veal, 5 B. & A. 454.

1484. LOCKE v. SWAN, 13 Mass. R. 76.

S. P. as in Hooper v. Perley, (ante).

Denied in Bronde v. Haven, 1 Gilpin, 606.

1485. LOCKHART v. MACKRETH, 5 T. R. 661.

It appears to have been considered that where a defendant pleads a plea which is a nullity in consequence of its not being signed by counsel, the plaintiff may sign judgment immediately, without waiting till the time for pleading is out.

Overruled in Pepperell v. Burrell, 2 Dowl. Pr. R. 674; Macher v. Billing, 3 ib. 246, and note p. 249.

1486. LOCKNER v. STRODE, 2 Ch. Ca. 48.

Lord Loughborough in 1 H. B. 332, 'that case, as most of the others are in the same book, grossly misreported'—'In their general character, loose, meagre, and inaccurate reports, of not much weight or authority. But the report of some cases decided by Lord Ch. Cowper, in 3d and last vol. of the reports in Chancery, are distinguished exceptions to this complaint.' 1 K. C. 458.

1487. LOCKWOOD v. STURTEVANT, 6 Conn. R. 373. 386.

That the authority by virtue of which an administrator is empowered to sell and convey estate, must appear on the deed of conveyance, and with such certainty that the act done shall visibly be warranted by the power conferred.

Overruled in Watson v. Watson, 10 Conn. R. 77.

1488. LOFFT'S REPORTS.

'These are said to contain important cases, but which, from a hasty mode of publication, are reputed to be very inaccurate, and have therefore not met with a favorable reception from the profession.' Bridg. L. B. 205. And Park, J. in 2 Bro. & B. 536, says, 'of that reporter, I shall say no more than this, that during a long professional life of 40 years, I never heard them quoted three times.'

1489. LOLLY'S CASE, 1 Dow's P. C. 124, *et seq.*; 1 Rus. & Ry. Cr. C. 237. S. C.

Held, by *all the judges*, that no sentence or act of any foreign country, or state could dissolve an English marriage *a vinculo*, for ground on which it was not liable to be dissolved *a vinculo* in England.

Oppo. Harding v. Allen, 9 Greenl. R. 140.

1490. LONG v. ALLEN, (Marsh. 570.)

The rule in England is, to apportion the premium, where usage has settled the rule of apportionment.

Denied. Hendricks v. Com. Ins. Co., 8 John. R. 8:—"With us, however, there never is an apportionment, because we have no usage."

1491. LONG v. BAILLIE, 4 Serg. & R. 226.

Holds to the exploded principle of *bias* as an objection to the competency of a witness. S. P. as in Henry v. Morgan, (ante).

1492. LONG v. COLBURN, 11 Mass. 97.

Parker, C. J. in Ballou v. Talbot, 16 Mass. 463, says; "What is stated in the case of Long v. Colburn, as an intimation of the Court, viz. that in such a case a special action upon the case would be the proper action." Held, that one signing a promissory note and adding "agent for B." without authority, is not liable as on his own promise, but only in a special action on the case.

1493. LONG v. DENNIS, 2 Vern. 530.

Observations on this case (4 Burr. 2052; 19 Ves. 19,) 'as going too far against conditions for consent to marriage.'

1494. LONGFORD v. ELLIS, 1 H. Bl. c. 29. n.

Overruled in Ex parte Charles, 14 East, 197; and Walker v. Barnes, 5 Taunt. 778.

1495. LONG'S CASE, 5 Rep. 120.

In all indictments for murder or manslaughter, a stroke ought to be directly alleged, unless in case of poisoning, &c.

Holt said "there was not a case in the law like that—and that by his consent they would not be so nice again." Regina v. Best, 2 Ld. Raym. 1169; Vid. 1 D. & E. 69.

1496. LONSDALE v. CHURCH, 2 D. & E. 388.

That in an action on bond, damages may be recovered beyond the penalty.

Denied in Wilde v. Clarkson, 6 D. & E. 303; and Hefford v. Alger, 1 Taunt. 218; Vid. Warner v. Thurlo, 15 Mass. 154.

Interest, beyond the penalty, is allowed in Massachusetts, Harris v. Clap, 1 Mass. 308; but not in Virginia, Atwell v. Towles, 1 Mumf. 175; See White v. Sealy, (post).

1497. LORD ANTRIM v. DUKE OF BUCKINGHAM, 1 Cha. Ca. 18; 1 Sid. 101; 3 Salk. 276; 3 Freem. 168; 1 Ab. Eq. 343; Comyn R. 496.

Doubted. It is said to be (O'Bridgm. R. 109 n.) "so variously and so loosely noticed, that it is difficult to conclude upon what principle the decision against the lease was grounded."

1498. LD. BEAULIEU v. LD. CARDIGAN, Amb. 533; 3 Bro. P. C. by Toml. 277.

Doubted. "The authority of this decision as affording a general rule, is very questionable." Math. on Presump. Ev. 425, n. (b); see also Butrick v. Broadhurst, 1 Ves. Jr. 172.

1499. LORD v. BRIG WATCHMAN, Reported in 8 Vol. Jurist, 284; as to insolvent assignments.

Doubted in 8 Vol. Jurist, 338.

1500. LORILLARD v. PALMER, 15 John. R. 14.

Reversed in Palmer v. Lorillard, 16 John. R. 346.

1501. LOVE v. BAKER, 2 Freeman, 125; 1 Cha. Ca. 67.

Denied in Portarlington v. Soulby, 3 My. & Ke. 104. (8 Cond. p. 299): "has not been recognised or followed in later times."

1502. LOVE v. DAY, 1 Barnes, 226.

That a regular nonsuit connot be set aside.

Overruled. 4 Burr. 1986.

1503. LOVE v. WALL, 1 Hawk. 313.

Doubted in Smith v. Smith, Dev. Eq. R. 178.

1504. LOVELACE'S (Ld.) CASE, 1 Jon. 271; 2 Bulst. 36; Show. 420.

No prescription or custom is good against a negative statute, whether it be declaratory of the common law, or introductive of a new law.

Doubted in Dwarf on Stat. p. 641.

1505. LOVELL v. LELAND, 3 Verm. 581; (Mass. R. S. part 3, tit. 3, c. 107.)

If a mortgagee after foreclosing his mortgage sues for an unsatisfied balance of his debt it will open the foreclosure.

Oppo. Hatch v. White, 9 Cow. 346. See Lansing v. Goelet, 2 Gall. R. 152.

1506. LOVIE'S CASE, 10 Rep. 85, a.

That a remainder cannot be limited, after a contingent fee, &c.

Denied per Powell, J. in 2 Ld. Ray. 1150; and per Buller, J. 4 D. & E. 68.

1507. LOWES v. MAZZAREDO, 1 Stark. R. 385; S. C. in Chitty on Bills, 105, (ed. 1821).

Held, that if the payee of a bill of exchange endorses it upon an usurious contract, a bona fide holder cannot afterwards recover upon it against the acceptor.

Denied in Cram v. Hendricks, 7 Wend. 573.

1508. LOWRIE v. BOURDIEU, Doug. 471, cited by the Court in Bilbie v. Lumley, 2 East, 469.

Ignorantia juris non excusat.

Doubted in Brisbane v. Dacres, 5 Taunt. R. 158, 9—Chambre, J.: "I do not see the application of the maxim used by Buller, J.; it applies only to cases of delinquency, where an excuse is to be made: I have searched for, to see if I could find any instance of similar application of this maxim."

1509. LOWTHER v. CARLTON, 3 Atk. 139.

Doubted in Calv. on Part. in Eq. p. 11 :—"in which persons are reported to have been made parties (to a suit in equity) upon a principle of mutual assistance, is not very intelligible."

1510. LOWTHER v. CARRILL, 1 Vern. 221.

A. agrees by parol with B. for a lease which is drawn, and then perused and corrected by A.'s counsel, and afterwards ingrossed and executed by B. Whether this is within the statute of frauds as to A. Ld. Keeper ordered defendant to answer.

Overruled in Hawkins v. Moore, 1 P. Wms. 776.

1511. LUDDEN v. LEAVIT, 9 Mass. 104; Warren v. Leland, ib. 265; 14 ib. 217.

One to whom the sheriff delivers goods for safe keeping merely, has not such an interest in the goods as will enable him to maintain an action.

Oppo. Poole v. Symonds, 2 N. H. R. 280.

1512. LUDLOW v. SIMONDS, 2 C. C. E. 40, 51, 56; 2 J. C. 369; 4 J. C. 290.

Denied in Baker v. Biddle, 1 Baldw. R. 415—Baldwin.

1513. LUDLOWS v. DALE, 1 J. Cas. 16.

Reversed in 2 J. Cas. 451. See 2 K. Com. p. 121. n. (c).

1514. LUKE v. LYDE, 2 Burr. 882; 1 Bl. 90. S. C.

That in case of a loss at sea, freight must be paid only in proportion to the goods saved, and the part of the voyage which was performed.

"Several times questioned"—Vid. Abbott on Shipping, 347 note, 352, and said to have been "reluctantly admitted" in Mulloy v. Backer, 5 East, 316; Vid. also Liddard v. Lopes, 10 East, 526. And denied in Post v. Robertson, 1 Johns. 24; Coffin v. Coffin, 5 Mass. R. 252. In the latter case, *Parsons*, C. J. says;—'the rule adopted in *Luke* v. *Lyde*, is manifestly unjust; for it was there held that freight was to be paid the proportion in time of sailing;—It should be the proportion in the respective rates of freight, so that defendant may eventually pay according to the benefit he has actually received, which is the principle on which the marine law is founded.'

1515. LUTTERELL v. REYNELL, 1 Mod. 282; Sir John Friend's case, 13 How. St. Tr. 32; Gilbert, C. B. p. 150; Hawk. P. C. b. 2. c. 46. s. 48; B. N. P. 294.

All which seem to affirm that proof of former declarations in support of the credit of a witness, is admissible.

Overruled in Parker's case, 3 Dougl. 242; Roscoe Cr. Ev. p. 142, (Am. ed.) and the *cases* cited n. (2). See Craig v. Craig, 5 Rawle's R. 91—Gibson; and 1 Phil. Ev. 230.

1516. LYNN, Mayor of, v. DENTON, 1 D. & E. 689.

That where a corporation is plaintiff, the defendant may have leave to inspect their books, of course.

Overruled in Mayor of Southampton v. Graves, 8 D. & E. 590.

1517. LYON v. RICHMOND, 2 J. Ch. R. 51.

Reversed in Tallmadge et al. v. Lyon, 14 John. R. 501; *Held*, that a decree in a former suit, to be available, should have been pleaded, or relied on in the answer, as a bar; and must state so much of the former bill and answer, as to show that the same point was then in issue.

1518. LYSONS v. BARROW, 10 Bing. 563.

Limited in Engler v. Twisden, 2 Bing. N. C. 263. "It seems to me, that Lysons v. Barrow has laid down the law somewhat too favorably for executor plaintiffs, and that it is a safer and sounder rule to say that they stand in the same situation as any other plaintiff, unless they have been misled by some misconduct on the part of the defendant." —Tindal.

1519. M'ALLISTER v. MONTGOMERY, 3 Hayw. R. 94.

The legal title to real estate held by joint partners is in the survivor, who may sell it.

Oppo. Robinson v. Crowder, 4 M'Cord, 519; and 3 K. C. 38.

1520. M'CALL'S ESTATE, Ashm. R. 357.

That compound interest can be awarded under no circumstances, at least against an administrator.

Denied in the matter of Harland's case, 5 Rawle's R. 323; Scheiffelin v. Stewart, 1 J. Ch. R. 620. Though embarrassed by conflicting opinions in England, Gibson, C. J. says, (In the matter of Harland's case, (supra).) "The weight of American authority is in favor of the rule, therefore, as four to one."

1521. MACCLESFIELD v. FITTON, 1 Vern. 168.

Doubted. Calv. on Part. in Eq. 106. (Am. ed.)—'The report is altogether unsatisfactory.'

1522. M'CORMICK v. BULLER, cited 3 Ves. 174.

This case is questioned in Nevison v. Langdon, cited in 10 Ves. 585, and contradicted in Sockett v. Wray, 4 Bro. Ch. Ca. 346, n. 565. per Sir Wm. Grant's opinion in Richards v. Chambers, 10 Ves. 580.

1523. M'CULLOCH v. HOUSTON, 1 Dall. 441.

That the indorsee of a note, under the act of the 28th of May, 1715, takes it at his peril.

Doubted in Ridgway v. The Farmers' Bank, 12 S. & R. 265, 'though never overruled, it has always been regretted.'

1524. M'CULLOCH v. SAMPLE, 1 Penn. R. 422.

Denied in Kline v. Guthart, 2 Penn. R. 494—Gibson, C. J.:—"I mention this case of M'Culloch v. Sample, to mark my dissent from it, that having been omitted in the report."

1525. M'CULLOCK v. THE EAGLE INS. CO., 1 Pick. 278.

Where the plaintiff wrote by mail inquiring upon what terms he would insure his vessel; and the defendants wrote in reply stating the premium, but on the next day again wrote and retracted their offer. The plaintiff had accepted the offer contained in the first letter, and put his letter into the post office to notify the defendants of such acceptance before the receipt of their second letter. Held, that this was not a binding agreement.

Denied in Mactier v. Frith, 6 Wend. 116.

1526. M'DILL'S LESSEE v. M'DILL, 1 Dall. 63.

Denied by Tilghman C. J. 2 S. & R. 83, and 1 Binn. 190.

1527. M'DONALD v. HODGE, 5 Hayw. R. 85; (acc. 11 S. & R. 445.)

The rule of damages was the *value* of the article and not the sum specified in the note.

Overruled in Pinney v. Gleason, 5 Wend. 393; Brooks v. Hubbard, 3 Conn. 58.

1528. M'DOUGAL v. NICHOLLS, 4 D. P. C. 76.

The court has no power to compel a witness to attend to give evidence on an inquiry before the Master.

1529. M'ELWEE v. HOUSE, 1 Bayley R. 108.

Overruled in Morris v. Peay, 1 Hill's R. 35. The point decided in this case (Morris v. Peay) was, that a nominal plaintiff, who has transferred his interest in the note, shall not be allowed fraudulently to discontinue the action, and thereby defeat the right of the real plaintiff.

1530. M'FARLAND v. SHAW, 2 Car. L. R. 102.

Dying declarations of a daughter were admitted in a civil action.

Oppo. Wilson v. Boerem, 15 John. 286; Doe v. Ridgway, 4 B. & A. 53. It does not appear that such evidence has been received, except in cases of homicide, and in civil cases, where the declarations have been made before attesting witnesses.

1531. M'KEE v. GARRETT, 1 Bail. R. 341.

A way cannot be prescribed through unenclosed woodlands.

Denied in Smith v. Kinard, 2 Hill's R. 642, n.

1532. M'KEE v. THOMPSON, Addis. R. 24.

A submission to an award by an executor amounts to an admission of assets.

Denied in Hoare v. Muloy, 2 Yeates, 161; Swicard v. Wilson, 2 Conn. 288; Pearson v. Henry, 5 T. R. 6.

1533. MACKEY v. COLLINS, 2 Nott & M'Cord, 186, and Farman v. Emore, ib. 139, note.

Oppo. Watton v. Hele, 2 Saund. 177, and Patton v. M'Farlane, 3 Pen. R. 423.—Held, that an eviction must not only be alleged, but proved, in order to maintain an action upon a covenant of warranty.

1534. MACKIE v. CAIRNS, 1 Hopk. Ch. R. 373.

Reversed in 5 Cowen, 547, S. C.

1535. M'KILLIP v. M'KILLIP, 2 S. & R. 489.

Denied in Slocum v. Taylor, 8 S. & R. 401:—"That case is not stated by the reporters with their usual clearness."

1536. M'INTYRE v. MANCIUS et al., 3 J. Ch. R. 45.

Reversed in S. C. 16 John. R. 592; Held, that a Court of Chancery

will not compel a defendant to discover that, which, if he answers in the affirmative, will subject him to punishment, or render him infamous, or expose him to a penalty; and if the bill require him to answer to facts of this description, he may demur to it successfully. But if a party has been joined in the bill for the purpose of depriving a party of his evidence, it forms no objection to the discovery that such party might prove the note usurious.

1537. M'LAUGHLIN v. SCOTT, 1 Binn. 61.

Doubted it seems by Tilghman, C. J. in Stuart v. Harris, 3 Binn. 323, —' decided hastily, and upon very little argument.'

1538. M'MILLAN v. HAPLEY, 2 Car. Law R. 89.

That trespass will not lie for the purchaser, for an intermediate trespass.

Doubted in Davidson v. Frew, 3 Dever. R. 3—Henderson, C. J.

1539. MACTIER v. FRITH, 1 Paige Ch. R. 434.

Reversed on appeal, 6 Wend. 111.

1540. M'VEAUGH v. GOODS, 1 Dall. 62; 2 Dall. 50.

S. P. as in The Trust. of Lansinburgh v. Willard, (post).

1541. MADDOCKS v. HAMBY, (or Hankey,) 2 Esp. 447.

The admission by the endorser, of the endorsement being his hand writing, is admissible and sufficient evidence.

Overruled in Robertson v. Crockett, 1 Yerg. R. 203; See also Humonious v. Robertson, Barnes' Notes, 436.

1542. MADOX v. HOSKINS, 1 Hayw. R. 4.

Overruled in Porter v. M'Clure, 1 Hayw. R. 360.

1543. MAGGOT v. MILLS, 1 Ld. Raym. 287; Dowe v. Holdsworth, Peake's R. 64; Robert v. Garnie, 3 Caines, 14; see 9th Wh. 737; Hill & Braxton v. Southerland's Ex., 1 Wash. R. 128.

Although if the debtor neglect to make the application at the time of payment, the election is then cast upon the creditor, yet it is incumbent upon the latter, in such a case, to make a *recent* application, by entries in his books or papers.

Doubted. See Mayor, &c. of Alexandria v. Patten, 4 Cranch, 317;—Marshall :—The creditor need not elect immediately; 2 Phill. Ev. 131; " at any time." Stone v. Seymour, 15 Wend. 31, 2.

1544. MAIGLEY v. HAUER, 7 John. R. 341.

S. P. as in Schermerhorn v. Vanderheyden, (post).

1545. MAIN'S CASE, 5 Rep. 21.

Overruled as to the point that an action of covenant will not lie during the term, on a covenant to keep in repair the houses demised. Luxmore v. Robson, 1 Barn. & Ald. 584. It was also denied by Dodderidge, J. in 2 Rol. Rep. 347.

1546 MAIRS v. SMITH, 3 M'Cord, 59 ; Cohen v. Greer, 4 ib. 509.

Overruled in Mayzick & Bell v. Coiel, 1 Hill's R. 311. note (a).

1547. MAITLAND v. GOLDNEY, 2 East, 426.

S. P. as in Northampton's case, (post).

1548. MALLISON v. ANDREWS, 2 Bro. C. C. 26. n., Ch. Hill, 1782.

Denied by Sugden on Pow. p. 280, and n. (1). The case, it should seem, cannot stand consistently with the later determinations—" There appears to be reason to suspect, from the striking similarity of the names, that the case of Mallison v. Andrews, is merely an inaccurate statement of the former, (Brown,) or that the case (Maddison v. Andrew, 1 Ves. 57,) has been confounded with some other."

1549. MALPICA v. M'KOWN, 1 Miller's Lou. R. 248.—Porter.

The value of the ship and freight earned, does not furnish the measure of responsibility of the owner thereof for the acts of the master.

Oppo. Crane v. The Rebecca, Dist. Ct. Maine, (1831,) 11 No. Jurist—Ware.

1550. MANATON v. MOLESWORTH, 1 Eden, 18.

Overruled in Dolan v. Neville, 2 Moll. Ch. R. 494, as to one point, viz.—the propriety of proceeding by original bill in such cases.

1551. MANBY v. SCOTT, 1 Mod. R. 124 ; 1 Sid. 109 ; 1 Lev. 4. S. C.—3 Judges dissenting.

If a wife *elope*, and, on her husband refusing to be reconciled, she lives apart from him ; and during this separation furnish her with goods contrary to the *express prohibition* of the husband, the husband is not liable to pay for them, although they are found to be necessary for the wife, and she has no *separate maintenance.*

Overruled in Montague v. Benedict, 3 B. & C. 631 ; M'Cutchen v. M'Gahay, 11 J. R. 281 ; see also Bolton v. Prentice, Str. 1214.

1552. MANCHESTER v. VALE, 1 Saund. n. 3; 1 Chit. Pl. 554.

If a plea professes to answer only a part of the count, and is such in truth, the plaintiff must take his judgment by *nil dicit* for the part not answered, and cannot demur ; and if he demur or plead over, it amounts to a discontinuance.

Denied in Sterling v. Sherwood, 20 J. R. 204; Hicock v. Despard, 8 ib. 617.

1553. MANHATTAN CO. v. OSGOOD, 15 J. R. 167; 1 Cowen, 65.

Reversed in Osgood v. Manhattan Co., 3 Cowen, 612.

1554. MANN v. HATCH, 9 Wend. 262.

Reversed in Hatch v. Mann, 15 Wend. 44.

1555. MANN v. LENT, 10 B. & C. 877.

S. P. as in Morgan v. Richardson, (post).

1556. MANNERS v. POSTAN, 4 Esp. 239.

That the confession of a party executing a deed is no evidence; but proof must be made by the subscribing witnesses.

Denied in New York. Hall v. Phelps, 2 Johns. 251.

1557. MANNING v. NEWNHAM, 3 Dougl. R. 130.

Doubted if not overruled. See 3 Dougl. R. 130. n. a. See also 2 Phil. Ev. 49, and notes.

1558. MANNING v. WHEATLAND, 10 Mass. R. 502.

Doubted in Knights v. Putnam, 3 Pick. 184; and in Fox et al. v. Whitney, 16 Mass. 118. Wilde, J. said, "the authority of that case has been questioned, and the objection to the doctrine, as there laid down, was entitled to great consideration. The witness was held to be incompetent, not because he was interested, but on the ground of legal policy, which will not permit one who has transferred a negotiable security as valid, to invalidate it by his testimony; but in that case, as in this, there was no illegality in the original contract, and no usury except in the transfer, in which the plaintiff himself was the guilty party."

1559. MANT v. MAINWARING, 8 Taunt. 139.

In an action on a joint contract against several partners, held, that one of the defendants was not competent, for the plaintiff, without the consent of the other defendants, to prove the partnership between himself and them; although he had suffered judgment by default, and had been released by the plaintiff as to all other actions, excepting the one then on trial.

Oppo. in Warrall v. Jones, 7 Bing. 395.

1560. MANTON v. HOBBS, 2 Mass. R. 433.

Ch. J. Parsons said, that in a covenant of seisin, it was not necessary "to show seisin under an indefeasible title; that a seisin in fact was sufficient; and that if, at the time the grantor executed the deed, he

had the exclusive possession of the premises, *claiming* the same in fee-simple, by a title adverse to the owner, he was seised in fee, and had good right to convey."

Denied in Lockwood v. Sturdevant, 6 Conn. R. 385; Richardson v. Dorr, 5 Verm. R. 1.

1561. MANWOOD v. HARRIS, Savile, 71.

Overruled in Whelpdale's case, 5 Rep. 119. 3d res.; Pigot's case, 11 Rep. 27. 1st res.

1562. MARCH (Earl) v. PIGOT, 5 Burr. R. 2802.

Doubted in Hammond v. Allen, 2 Sumn. R. 387—Story—"I do not say, whether that case was, or was not rightly decided; for upon that point grave doubts may be entertained."

1563. MARCH'S REPORTS.

——"A very indifferent reporter." Per Parker, C. J., 10 Mod. 138.

1564. MARIETTA v. PINDALL, 2 Rand. R. 465.

A banking corporation of Ohio cannot prosecute an action in Virginia on a contract made in Virginia.

Doubted. Brown v. Minis, 1 M'Cord, 80; 5 Conn. 560; Hullet v. K. of Spain, 1 D. & C. 169; 2 Ld. Raym. 1532.

1565. MARRYATT'S OPINION, 5 Went. 152.

That no action could be sustained for a quit rent.

Overruled in Duke of Leeds v. Corporation of Radnor, 2 Bro. Ch. Ca. 338. See 2 Chit. Gen. Pr. (Supp.) p. 60.

1566. MARSHALL v. The DELAWARE INS. CO., cited 4 Mass. 229.

That the facts and not the information of the parties must govern in making the contract of insurance.

Doubted in Dorr v. N. England Mar. Ins. Co., 4 Mass. 221, by Parsons, C. J. who says—"Great inconvenience may arise from the defendant's position; and it is the usage of merchants to consider the right to abandon as depending on the facts known, and upon this principle premiums of insurance have been regulated."

1567. MARSHALL v. RUTTON, 8 T. R. 545.

"A *barrister* practising only in the Courts of *law*, recently advised that there was no *remedy whatever* against a married woman, who had a considerable separate estate, and had jointly with her husband made a promissory note for £2500 debt of her husband; because by the decision of Marshall & Rutton the contract of a married woman is absolutely void:—Not knowing, that in *equity*, payment might have been en-

forced out of the separate estate. (Bullpen v. Clarke, 17 Ves. Jun. 366; Hulme v. Tenant, 1 Bro. P. C. 16; Stewart v. Kirkwall, 3 Madd. R. 387; Bingham v. Jones, at Rolls, 1832, Chitty on Bills, 8th ed. 791; Field v. Sowle, 4 Russ. R. 112.) So on the other hand the *remedy* was said to be only in *equity*, although the *case stated*, that, after the death of the husband, the wife had *promised* to pay, in consideration of forbearance, and upon this promise she might have been *arrested and sued at law*. (Lee v. Muggeridge, 5 Taunt. 36; Littlefield v. Shee, 2 B. & Adol. 811.)

1568. MARSON v. PETIT, 1 Camp. 82, n.

That the introduction into the bill of a place of payment without the knowledge of the acceptor, was immaterial.

Overruled in Rowe v. Young, 2 B. & B. 165; 2 Bligh R. 391; Cowie v. Halsall, 4 B. & A. 197.

1569. MARTIN v. HEATHCOTE, 2 Eden, 169.

"Merchants accounts, after six years discontinuance of dealing, were as much within the statute as any accounts."

Denied in M'Clellan v. Croften, 6 Greenl. 346; Bass v. Bass, 8 Pick. 187. See Spring v. Gray's Ex., 6 Pet. 151; Edmandstone v. Thomson, 15 Wend. 554.

1570. MARTIN v. MERRITT, Martin, 18.

Denied in Morgan v. Cone, 1 Dev. & B. 234—Gaston.

1571. MARTIN v. MITCHELL, 2 Jac. & Walk. 428.

S. P. as in Lawrenson v. Butler, (ante).

1572. MARTIN v. MOTT, 12 Wheat. 19.

As to the right of the President of the U. S. to judge of the exigency of calling out the Militia.

Oppo. 8 Mass. 554.

1573. MARTIN v. MOULIN, 2 Burr. 978, 9.

That a parol gift or relinquishment of a mortgage debt, will release the mortgage itself, without regard to the question of consideration or actual delivery.

Doubted in Whitehill v. Wilson, 3 Penn. R. 413. In Duffield v. Hicks, 1 D. & Cl. 13, Eldon, (Earl of), "I must presume to question the accuracy of Lord Mansfield's doctrine." The House of Lords in this case decide, that a father, in contemplation of speedily approaching death, wishing to make a larger provision for a daughter than he had done by his will, delivers or causes to be delivered to her a bond and a mortgage security for a sum of money. This is a good *donatio mortis*

causa, and the heir or executor is bound to give effect to the intent of the donor. "This is the first absolute decision on the question." (Decided in 1827).

In a later case, (Royston v. Hankey, 3 Moore & Scott, 381) declarations by an intestate that he meant that a person with whom he resided should have his furniture and effects for what he owed her:—Held, sufficient to entitle such person to take, and retain possession of the property. Ch. J. Tindal, observes:—"There was no complete or absolute delivery required, as both the intestate and the defendant lived under the same roof, and it was proved that he was indebted to her for rent, and all his property was on the premises at the time of his death."

1574. MARTIN v. NICOLLS, 3 Simons, 458.

A foreign judgment cannot be questioned in the courts in this country.

Doubted. See Walker v. Witter, (post).

1575. MASON v. DAY, Prec. in Ch. 319; Pierson v. Shore, 1 Atk. 480.

Explained in S. C. in 1 West's R. 711.

1576. MASON v. GRAFTON, Hob. 245.

Action against an innkeeper not laying *commune Hospitium*; yet because the declaration laid in the custom for common inns and then laid that *hospitatus in hospitio*, the plaintiff had judgment.

Denied in Sanders v. Spencer, 3 Dyer, 266;

1577. MASON v. JACKSON, 3 Lev. 60.

Same rule as in Cockerill v. Kynaston, (ante). Denied in Henshall v. Roberts, 5 East, 150.

1578. MASON & HALE v. DENNISON & DENNISON, 15 Wend. 64.

Held, that the infancy of one of two defendants as *joint debtors*, against whom judgment is rendered without assigning guardian *ad litem* to the infant, cannot be assigned as error in fact.

Oppo. Castledine v. Mundy, 1 Nev. & M. 635; 4 B. & Ald. 90: Held, that if an infant appear in person and not by guardian or *prochein ami*, it is error in fact. See Burgiss v. Merrill, 4 Taunt. 468; 3 Taunt. 307.

1579. MASON v. SKURRAY, Park. 116.

Same doctrine as in Cocking v. Fraser, ante.

1580. MASTER v. MILLER, 4 T. R. 320, and 2 H. Bl. 140.

An unauthorised alteration of the date of a bill of exchange, after acceptance, whereby the payment should be accelerated, even though

made by a stranger, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration.

In Alderson v. Langdale, 3 B. & Ad. 660, the doctrine was carried still further, and it was held that such an alteration made by the plaintiff operated as a satisfaction not only of the bill, but of the debt which it was given to secure. In Alderson v. Langdale, the debtor was the *drawer* of the bill altered; but in Atkinson v. Hawdon, 2 A. & E. 269, it was held that where the debtor, being himself the maker or acceptor, could have no remedy on the instrument against any other party to it, his liability would not be extinguished by the alteration.

Alterations in the date, sum, or time for payment, or the insertion of words authorising transfer or expressing the value to be received on some particular account, adding the name of a maker or drawer, or an unwarranted place for payment, are *material* alterations within the above rule. See Walton v. Hastings, 4 Camp. 223; 1 Stark. 215; Outhwaite v. Luntly, 4 Camp. 179; Bowman v. Nicholl, 5 T. R. 537; Cardwell v. Martin, 9 East, 190; Kershaw v. Cox, 3 Esp. 246; Knill v. Williams, 10 East, 431; Clark v. Blackstock, Holt, 474; Tidmarsh v. Grover, 1 M. & S. 735; Cowie v. Halsall, 4 B. & A. 197; R. v. Treble, 2 Taunt. 328; Alderson v. Langdale, 3 B. & Ad. 660; Taylor v. Moseley, 6 C. & P. 278.

An alteration made with the consent of parties before a bill or note has issued is of no importance, for, up to the time of issue, it is *in fieri;* Downes v. Richardson, Bayley on Bills, 5th ed. 116; Johnson v. D. of Marlborough, 2 Stark. 313; so when made by an agent of all parties. Sloman v. Cox, 5 Tyrwh. 175. And a bill or note is said to be *issued* when it is in the hands of some party entitled to make a claim upon it. Downes v. Richardson, *ubi supra;* Cardwell v. Martin, 9 East, 190; Kennersly v. Nash, 1 Stark. 452.

If a bill or note exhibit the appearance of alteration, it lies upon the holder to account for it. Henman v. Dickenson, 5 Bing. 183; Bishop v. Chambre, 1 M. & M. 116.

A cancellation by mistake does not affect the liability of the parties whose signatures are cancelled. Roper v. Birbeck, 15 East, 17; Wilkinson v. Johnson, 3 B. & C. 428; Novelli v. Rossi, 2 B. & Ad. 765.

1581. MASTERS *q. t.* v. DRAYTON, 2 D. & E. 496.

Held that the borrower, not having paid the money, and though bankrupt, yet not being certificated, was not a competent witness to prove the usury.

But the contrary was decided in Smith v. Prager, 7 D. & E. 60, where the borrower was admitted, not only to prove the usurious agreement, but the repayment of the money.

So in Massachusetts, Com'th v. Frost, 5 Mass. 53.

1582. MATTHEWS v. GRIFFITHS, Peake's R. 200; 7 T. R. 185.

Overruled in Hammet v. Yea, 1 B. & P. 144.

1583. MAVING v. TODD, 1 Stark. R. 72; S. C. 4 Camp. 225.

Doubted by Mr. Justice Story (Com. on Bailm. 294, 5) as to the accuracy of the report in Starkie.

1584. MAXWELL'S LESSEE v. LEVY, 2 Dall. R. 381; 4 Dall. R. 330. S. C.

Doubted in Briggs v. French, 2 Sum. R. 257, *et seq.*

1585. MAXWELL v. WHETTENHALL, 2 P. Wms. 27, 4th point.

That a legacy payable out of a particular fund, yielding profits, shall, for that reason, bear interest from the death of the testator.

Denied per Ld. Redesdale in Pearson v. Pearson, 1 Sch. & Lefr. 10.

1586. MAY v. BROWN, 3 B. & C. 113.

The report corrected and explained in Tarpley v. Blabey, 2 Bing. N. C. 437.

1587. MAYER et al. v. JOHNSON et al., 3 Camp. 324.

Ld. Ellenborough held, that recovery could not be at law on a bank note cut in two only by production of the entire note, or by proof that the instrument or the other part, has been actually destroyed.

Denied in Hinsdale v. The Bank of Orange, 6 Wend. 380; Bank of U. S. v. Sill, 5 Conn. 112.

1588. MAYNARD v. DOWNER, 13 Wend. 576.

S. P. as in Arnold v. Sanford, (ante).

1589. MAYOR of LYNN v. DENTON, 1 D. & E. 689. MAYOR of LONDON v. MAYOR of LYNN, 1 H. Bl. 211.

That where corporations are parties, each may have a rule to inspect the other's books.

Overruled in Mayor of Southampton v. Graves, 8 D. & E. 590.

1590. MAYOR OF NORTHAMPTON v. WARD, 2 Str. 1239, 1 Wils. 115—(For Stallage).

"That trespass was the proper form of action, and that debt nor assumpsit would lie."

Overruled in The Mayor, &c. of Newport v. Saunders, 3 B. & Ad. 411:—Held, that assumpsit lies.

1591. MAXWELL v. WETTENHALE, 2 P. Wms. 27.

Doubted in Pearson v. Pearson, 1 Scho. & Lef. 11, as to the 4th point.

1592. MEAD v. DAUBIGNEY, Peake's R. 125—Kenyon.

In an action for words spoken to A. concerning the plaintiff, evidence of words (not in themselves actionable) spoken to B. may be received to show the malice of the defendant.

Overruled in Rustell v. Macquister, cited in 1 Camp. R. 49; 2 Phill.

Ev. 546; but see Wallis v. Mease, 3 Binn. 546:—Other words, *not actionable*, admissible, by way of shewing the malice of a defendant; the words *laid* being first proved. See Gould v. Weed, 12 Wend. 12, 24. See Bodwell v. Swan, 3 Pick. 376, 378.

1593. MEAD v. DEGOLYER, 16 Wend. R. 632.

It seems from the facts in the case that defendant had paid money for the timber contracted for, subsequent to the expiration of the time for performance; yet Held, that performance of the contract was a condition precedent to the plaintiff's recovering on a *quantum meruit*.

Oppo. Hayden v. Madison, 7 Greenl. 76. The payment of money on a special contract knowing that it had not been completed is a waiver of objection on account of the plaintiff's non-compliance. See also Bridley v. Tibbets, 7 Greenl. 70; Oxendale v. Wetherell, 9 B. & C. 386; Shipton v. Casson, 5 B. & C. 378; cited in 2 Stark. Ev. 872.

1594. MEAD v. LD. ORRERY, 3 Atk. 240.

Doubted in Wilson v. Moore, 1 M. & K. 337; (7 Cond. 83.)

Shaken by Bonney v. Ridgard, 2 Bro. Ch. Ca. 438; Hill v. Simpson, 7 Ves. Jr. 152.

1595. MEANEY v. HEAD, 1 Mason's R. 322.

Replevin for goods. Plea, property in one Green, who put them in defendant's store, for storage merely. The defendant had no lien on the goods. And the Court held that if he had pleaded *non cepit*, the verdict must have been in his favor, on the ground that there had been no *tortious* taking.

But this doctrine is questioned in Baker & al. v. Fales, 16 Mass. 153.

1596. MEARS v. SERACOLD—Ld. Mansfield. Orr v. Chase, 1 Mer. 729, Sir Thomas Plumer.

Overruled in Harrison v. Jackson, 7 T. R. 207.; Cady v. Shepherd, 11 Pick. 403.—Wilde, J.:—That a partner has not a general authority to bind his co-partner, by a contract underseal, without his previous assent or subsequent adoption. See 10 East, 427, in notes.

1597. MEASON v. PHILLIPS, Addis. R. 346, and Edgar v. Bois, 11 S. & R. 445.

On a lease of lands at a stipulated rent, payable in grain at certain specified prices per bushel; held that the rule of damages for breach of such contract, was the value of the grain when the rent was payable.

Oppo. Brooks v. Hubbard, 3 Conn. 58; Pinney v. Gleason, 5 Wend. 393, reversing the decision of the Supreme Court in S. C. 5 Cowen, 152, 411.

1598. MEDDOWCROFT v. HOLBROOK, 1 H. Bl. 50.

Overruled in Vincent v. Holt, 4 Taunt. 453.

1599. MEDHURST v. BALAM, 1 Rol. Abr. 35, l. 20.

Words of incontinence *per quod consortium vicinorum per didit*, held actionable. But denied in Barnes v. Strudd, 1 Lev. 261.

1600. MEDINA v. STOUGHTON, 1 Salk. 210.

Ld. Holt is reported to have said, that where the seller of a personal chattel is *out of possession*, the bare affirmation that it is his, is not sufficient to charge him, without an express warranty.

Denied. This distinction is not mentioned in the report of the case in Ld. Raym. 593. See Buller, J. in Pasley v. Freeman, 3 Term, 57.

1601. MEE v. TOMLINSON, 5 N. & M. 624.

As to consolidation of distinct demands in plea—Plea of set-off.

Doubted in Jourdain v. Johnson, 2 C. M. & R. 564; and Marshall v. Whiteside, post, pl. 11; in which latter case Parke, B. stated that Patteson, J. was not satisfied with the decision. See No. 33, (Apl. 1837). A. Jurist, p. 131.

1602. MELAN v. DUKE OF FITZJAMES, 1 Bos. & Pul. 138.

That a man cannot be held to bail in England, on a contract to pay money in France, if, by the laws of France, his person was not there liable to restraint for debt.

Doubted per Ld. Ellenborough in Imlay v. Ellefsen, 2 East, 455. Vid. also 1 Caines, 407, in marg. and 2 Johns. 198.

1603. MELLISH v. MOTTEAUX, Peake, 115.

Plaintiff bought a brig "with all faults," and no representation was made of her condition. Afterwards *latent* defects were discovered, which defendant had previously known, but used no artifice to conceal: and he was held liable.

Overruled in Baglehole v. Walters, 3 Campb. 154; Vid. also Pickering v. Dowson, 4 Taunt. 779; Emerson v. Brigham, 10 Mass. 197.

1604. MENDES v. MENDES, 1 Ves. 89; 3 Atk. 619.

That marriage will determine the guardianship as to the female.

Denied in Roach v. Garvan, 1 Ves. 160; Matter of Whitaker, 4 J. Ch. R. 380.

1605. MEREDITH v. HINSDALE, 2 Caines' R. 362.

Overruled in Andrews v. Herriot, 4 Cowen, 508; the Ch. J. saying, "that Mr. B. (counsel for plaintiff) was fully supported by Meredith v.

Hinsdale, if that were now to be received as law; but the current of authority, since the decision of that case, had been uniform and unbroken, that the *lex loci contractus* governs only as to the construction of the contract; and has nothing to do with the remedy, which is controlled entirely by the *lex fori.*" See S. C. p. 510, n. (a).

1606. MERETONY v. DUNLOPE, cited in Lockyer v. Offley, 1 T. R. 252.

The ship received her death wound during the voyage, but was kept afloat by pumping, till after the policy was expired; and held that the underwriters were discharged.

Doubted in Peters v. The Phœnix Ins. Co., 3 S. & R. 27, 28: Tilghman, C. J.—" We have no report of this case which informs us of the nature of the policy. It was probably of that kind which precluded assured from recovering for a partial loss; otherwise this decision would be contrary to other cases of unquestionable authority, and could not be law."

1607. MERITON v. STEVENS, Willes R. 217.

S. P. as in Blanchard v. Myers, (ante).

Limited in Lane v. Bacchus, 2 Term R. 45; Brisban v. Caines, 11 John. R. 197.

1608. MERRILLS v. LAW, 9 Cow. 65.

Reversed in Law v. Merrills, 6 Wend. 268.

1609. MERRILL v. The ITHACA & OSWEGO R. R. C., 16 Wend. 586.

If an agent be *dead* at the trial, *original entries* made by him *in the usual course of business* may be admitted in evidence; but absence from the state is not a ground for admitting such evidence.

Doubted. Union Bank v. Knapp, 3 Pick. 96. If insane his handwriting may be proved. In Elms v. Chevis, 2 M'Cord, 349, held, that a book account may be proved by proving the handwriting of the clerk who made the entries, if he be out of the state.—Parker, C. J. in 15 Mass. 384, says:—" When the best evidence is out of the power of the party to produce, the next in degree must be resorted to." See The Phila. Bank v. Officers, &c., 12 S. & R. 49.—Duncan, J.

1610. MERRITT v. MERRITT, Martin, 18.

Denied in Morgan v. Cone, 1 Dev. & B. 234—Gaston—' The note of it is too vague and unsatisfactory to furnish a safe ground for reliance.'—' It may be an erroneous account of the case of Merritt v. Warmouth, reported in 1 Hayw. R. 12.' " Besides the decision is directly contradicted by that of Sheppard v. Edwards, 2 Hayw. R. 186, and in Stroud v. Wilkes, not reported, which one of our body personally knows."

1611. MERRYWETHER v. NIXON, 8 T. R. 186.

No action for contribution is maintainable by one wrong-doer, although the one who claims contribution may have been compelled to satisfy the whole damage arising from the *tort* committed by them both.

" From the inclination of the court, in Phillips v. Biggs, Hard. 164, from the concluding part of Lord Kenyon's judgment in Merrywether v. Nixon, and from reason, justice, and sound policy, the rule that wrong-doers cannot have contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." Per Best, C. J., in Adamson v. Jervis, 4 Bing. 72. Accordingly in Betts v. Gibbons, 2 Adol. & Ell. 57, such an action was held to be maintainable. There, the defendant consigned to the plaintiffs ten casks of acetate of lime, for Nyren and Wilson, two of which were delivered, but the remaining eight continued in the plaintiff's hands up to the time of Nyren and Wilson's bankruptcy, on which the plaintiffs, by the defendant's orders refused to deliver them to the assignees, who brought an action of trover, which the plaintiffs compromised by paying the value of the casks, together with the costs, and brought this action against the defendants for indemnity. They were held to be entitled to recover. " The principle laid down in Merrywether v. Nixon," said Taunton, J., is " too plain to be mistaken. The law will not imply an indemnity between wrong-doers. But the case is altered where the matter is indifferent in itself, and when it turns upon circumstances whether the act be wrong or not. The act done here, by changing the destination of the goods at the order of the defendant, was not clearly illegal ; and, therefore, not within the rule in Merrywether v. Nixon ;" accord. Humphreys v. Pratt, 2 Dow. & Cl. 288 ; Fletcher v. Harcot, Hutt. 55, S. C. as Battersey's Case, Winch. 48. In Colbourn v. Patmore, 4 Tyrwh. 677, 1 C. M. & Ros. 73, the proprietor of a newspaper sued his editor for falsely, maliciously, and negligently *inserting* a libel therein, without the knowledge, leave, or authority of the plaintiff, " in consequence of which the plaintiff was convicted and fined for falsely and maliciously *printing and publishing* the said libel." The case was determined against the plaintiff, on a slip in the pleading, the court being of opinion, that it was consistent with the statement in the declaration, that the plaintiff, though he did not know of the original insertion of the libel, might afterwards have knowingly and wilfully permitted it to be printed, and so have been convicted in consequence of his own criminal act, and not of that of the defendant. But, during the argument, the question, whether a newspaper proprietor, convicted and fined in consequence of the publication of a libel by his editor without his knowledge or consent, could maintain an action for indemnity, was elaborately discussed at the bar, and the court in delivering judgment expressed a strong opinion that he could not. " I am not aware," said Lord Lyndhurst, C. B., " of any case in which a man convicted of an act declared by law to be *criminal*, and punished for it accordingly, has been suffered to maintain an action against the party who participated with him in the offence, in order to procure indemnity for the damages occasioned by that conviction, but after hearing the argument, I entertain little or no doubt that such an action could not be maintained." (See Shackell v. Rosier, 2 Bing. N. C. 631.)

1612. MERTENS v. ADCOCK, 4 Esp. R. 251—Ellenborough.

A resale does not bar an action for goods bargained and sold, though it may be considered as an unlawful conversion. Doubted in Hage-

dorn v. Laing, 162, 166—Gibbs. This question, "is a question as to the pleading only; for there can be no doubt but that the plaintiff might, after reselling the goods, recover the same measure of damages in a special count, framed upon the refusal to accept and pay for the goods bought." Tindal, C. J. in Acebal v. Levy, 10 Bing. 376. See also Penniman v. Hartshorn, 13 Mass. 87; Bement v. Smith, 15 Wend. 493.

1613. METCALFE v. STANDFORD, 1 Bibb. 521.

S. P. as in Leyford's case, (ante).

Overruled in Anderson v. Barry et al., 2 J. J. Marsh. R. 265.

1614. METHOL v. PECK, Winch, 112; Hutt. 73. S. C. in C. B.

Reversed in B. R. 3 Bulstr. 298; Poph. 160; W. Jones, 85; Pullison v. Barnard, Savile, 72. S. P.

1615. MICK v. MICK, 10 Wend. 379.

The marginal note says—"That the alien widow of a natural born citizen cannot be endowed, by reason of her alienism.

Denied in Priest v. Cummings, 16 Wend. 617.

1616. MILAN v. DUKE OF FITZJAMES, 1 B. & P. 138; S. P. 3 Ves. 449.

That defendant was not liable to arrest on a contract made in France, on which, by the laws of France, he was not liable to arrest in that country.

Overruled in Imlay v. Ellefsen, 2 East, 453; Smith v. Spinola, 2 John. 198; Sicard v. Whale, 11 ib. 194; Scoville v. Canfield, 14 ib. 338; Peck v. Hozier, ib. 346; Levy v. Boas, 2 Bail. 219; Ayres v. Audibon, 2 Hill, 601; Pearsall v. Dwight, 2 Mass. 84.

1617. MILBANK v. REVETT, 2 Mer. 405.

"Milbank v. Revett, which was very shortly and very loosely argued, considers that the principles which are applied to partners are applicable also to tenants in common, which probably would not have been the opinion if the case had been more fully argued." Per V. Ch. in 2 Sim. & Stu. 145.

1618. MILES v. WILLIAMS, 1 P. Wms. 255.

Where it is said that if a bond be made to A. in trust for B. who becomes bankrupt, his assignees may sue in their own names, though B. must have sued in the name of his trustee.

This is denied in Ex parte Coysegame, 1 Atk. 193.

1619. MILLER v. ADSIT, 16 Wend. R. 335.

Held, in the Court of *dernier resort*, that replevin lies by a *receiptor* of goods, which have been taken in execution.

Oppo. Norton v. People, 8 Cowen, 137; Dillenback v. Jerome, 7 ib. 294; Mitchell v. Hinman, 8 Wend. 667; Phillips v. Hall, 8 ib. 614; Collins v. Butts, 10 ib. 410; Waterman v. Robinson, 5 Mass. 303; Ludden v. Leavitt, 9 ib. 104; Perley v. Foster, 9 ib. 112; Warren v. Leland, 9 ib. 265; Commonwealth v. Moore, 14 ib. 217; Bond v. Paddelford, 13 ib. 394; Prownell v. Manchester, 1 Pick. 232. See also Sto. on Bailm, 72 to 93; Fisher v. Bartlett, 8 Greenl. 122; Johns v. Church, 12 Pick. 557; Bursley v. Hamilton, 15 ib. 40; Collins v. Evans, 15 ib. 63. The *receiptor is the keeper for the officer;* Carr v. Farley, 3 Fairf. 328; Woodman v. Trafton, 7 Greenl. R. 178.

1620. MILLER v. HACKLEY, 5 John. R. 375.

Overruled in Buckner v. Finley, 2 Pet. R. 586: Held, that a bill of exchange drawn in another state is a foreign bill.

1621. MILLER v. JACOBS, 3 Watts, 477.

Reversed and explained in Jacobs v. Miller, 5 Watts, 208. S. C.

1622. MILLER v. STOCK, 2 Bail. R. 163.

In an action brought to render an agent personally liable, for goods purchased by him in the name of his principal, the *onus* lies upon the defendant to prove his agency: and it does not dispense with this proof, that the vendor has charged the goods in his books to the principal.

Oppo. Storr v. Scott, 6 C. & P. 241:—Where a tradesman makes out an account in the name of a particular person, it must be taken that the goods were furnished on the credit of such person, unless it be shown by *unequivocal evidence* that the credit was in fact given to another.

1623. MILLER v. TAYLOR, 4 Burr. 2303.

At common law, an author has the sole right of printing and publishing his work, and may sue whoever shall publish the same without his consent, &c.

Overruled in Donaldson v. Beckett, 2 Bro. P. C. 129; 4 Burr. 2408, S. C.; Millar v. Taylor, 7 Term R. 2303; See Bickford v. Hood, 7 T. R. 616; Wheaton v. Peters, 8 Pet. 591.

1624. MILLS v. BELL, 3 Call's R. 326.

It was said, that the rule of damages on a total failure of title, was the value at the time of eviction.

Overruled in Thelkeld's Adm. v. Fitzhugh's Exr., 2 Leigh's R. 451.

1625. MILLS v. DURYEE, 7 Cranch, 418.

Denied in Hall v. Williams, 6 Pick. 232, and in Starbuck v. Murray 5 Wend. 156.

1626. MILLS v. SPENCER, Holt's N. P. R. 534.

S. P. as in Northampton's case, (post).

1627. MILNER v. HORTON, M'Clel. 647.

Where a general covenant was held to be qualified by reference to other covenants.

Overruled in Smith v. Compton, 3 B. & Adol. 189—Tenterden :— "We have considered Milner v. Horton again since the argument, and we cannot feel ourselves bound by its authority; we are, therefore, under the necessity of coming to this conclusion, that the covenant declared upon being unqualified in itself and unconnected with any words in the qualified covenant, must, in a court of law, be regarded as an absolute covenant for title."

1628. MILTON'S CASE, Hardr. 485.

That debt does not lie on a bill of exchange by the payee vs. the acceptor, for that the undertaking of the acceptor is collateral only, and the acceptance creates no duty.

Vid. contra, Heylyn v. Adamson, 2 Burr. 674; that when the drawee has accepted, he becomes the original debtor. Also, Ruddle v. Price, 1 H. Bl. 547; Bishop v. Young, 2 Bos. & Pul. 78; Chitty on Bills, 220; 1 Cranch, 387; Bullard v. Bell, 1 Mason's Rep. 243.

1629. MINTON v. WOODWORTH, 11 John. R. 474.

Denied in Allen v. Smith, 7 Hals. 162.

1630. MILWARD v. CAFFIN, 2 W. Bl. 1330.

Doubted by Lord Kenyon, (Harper v. Carr, 7 T. R. 274,) on one point; with respect to which, however, it has been upheld both in K. B. and C. B. (Fletcher v. Wilkins, 6 East, 285, 286; Hurrell v. Wink, 8 Taunt. 369;) Governor, &c. of Bristol v. Wait et al., 1 Adol. & Ell. 264.

1631. MILWARD v. INGRAM, 1 Mod. 205; 2 Mod. 44; 1 Freem. 195, S. C.

Overruled. May v. King, 12 Mod. 538; Rhodes v. Barnes, 1 Burr. 9; 2 Bl. Rep. 65; Atherley v. Evans, Sayer, 269; 3 Lev. 237. S. P.

1632. MIREHOUSE v. RENNELL, 11 J. B. Moore, 139; 3 Bing. 223.

Reversed in S. C. in 7 B. & C. 113; 9 D. & Ry. 810. Reversed also in House of Lords, 1 Moore & Scott, 683.

1633. MITCHELL v. DALL, 2 Harr. & Gill, 159.

In respect to the appropriation of payments of money by a debtor to his creditor in reference to a surety or guarantor.

Reversed in S. C. 4 Gill & J. 361.

1634. MITCHELL v. JOHNSON, 1 M. & M. 176.

S. P. as in Page v. Mann, (post).

1635. MITCHEL v. REYNOLDS, 1 P. Wms. 181.

A bond or promise to restrain one from trading in a particular place, if made upon a reasonable consideration, is good. Secus, if it be on no reasonable consideration, or to restrain a man from trading at all.

Explained in Young v. Timmins, 1 Tyrwh. 226, 1 C. & J. 331, "and the rule to be collected from them all is stated in that case by Vaughan, B., p. 241, *viz.*, "any agreement by bond or otherwise in *general restraint* of trade, is illegal and void. But such a security given to effect a *partial restraint* of trade may be good or bad, according as the consideration is adequate or inadequate." In order, therefore, that a contract in restraint of trade may be valid *at law* (for even then equity is loath to enforce it specifically, if the terms be at all hard, or even complex, Kimberly v. Jennings, 1 Sim. 340, though in some cases it will do so per V. C., Kemble v. Kean, 6 Sim. 335,) the restraint must be *first* partial; *secondly*, upon an adequate consideration; and there is a third requisite, namely, that it should be *reasonable*, the meaning of which shall be presently considered.

First, the restraint must be *partial*. It was decided so early as the reign of Henry V. that a contract imposing a general restraint on trade is void. Indeed, Hall, J., flew into a passion at the very sight of a bond imposing such a condition, and exclaimed, with more fervor than decency: "A ma intent purres avoir demurre sur luy que le obligation est void eo que le condition est encounter common ley, *et per Dieu, si le plaintiff fut icy, il irra al prison tanq il ust fait fine al Roy.*" "The law," said Best, J., in Homer v. Ashford, 3 Bing. 328, "will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking *in the kingdom*, would be void. But it may often happen that individual interest and general convenience render engagements not to carry on trade, or to act in a profession, in a particular place, proper." Such partial restraints were upheld in Chesman v. Nainby, in Clerk v. Comer, Cas. Temp. Hardw. 53, where a bond was conditioned not to carry on trade within the city of Westminster, or bills of mortality; in Davis v. Mason, 5 T. R. 118, and in Bunn v. Guy, 4 East, 190, where an attorney bound himself not to practice *within London, and 150 miles from thence*. See remarks on this case in Bozen v. Farlow, Meriv. 472. In Gale v. Reed, 8 East, 79, the restraint was partial in a different way. There the defendant covenanted not to exercise the business of a ropemaker during his life, except on government contracts, and to employ the plaintiffs exclusively to make all the cordage which should be ordered of him by his friends or connexions. The plaintiffs were to allow him two shillings per cwt. on the cordage made on his recommendation for such of his friends or connexions whose debts should turn out to be good; and were not to be compelled to furnish goods to any whom they should be disinclined to trust. The court held this agreement good, considering that

they must construe the whole of it together, and that, construing it together, it appeared not to be the intention of the plaintiffs to restrain the defendant from supplying such of his connexions as they themselves did not think fit to trust.

Where the restraint is partial in respect of space, the proper way of measuring the distance is to take the nearest mode of access to the point whence it is to be reckoned. Leigh v. Hind, 9 B. and C. 774.

Upon the second point, namely, the *adequacy of the consideration*, it was held in Young v. Timmins, 1 Tyrwh. 226, that where Ireland bound himself to work exclusively for certain persons for his and their lives, they not undertaking to find him full employ, but, on the contrary, reserving to themselves liberty to employ others, the contract was void for want of *adequacy* of *consideration*, though it contained a proviso, under which Ireland was allowed to take and execute the orders of persons residing in London, or within six miles thereof. "If I could find," said Bayley, B., "any obligation on the defendants to find the bankrupt a supply of work sufficient to keep him and his workmen in an adequate and regular course of employ, that might be a good consideration for the restraint he thus imposes on himself. But if no such thing exists, but, on the contrary, I find it possible that no employ might, for a considerable time, be given to him, then there is no adequate consideration." "The restraint on one side meant to be enforced," said Lord Ellenborough, in Gale v. Reed, 8 East, 86, "should in reason be co-extensive only with the benefits meant to be enjoyed on the other."

Lastly, it is not sufficient that the restraint should be *partial*, and the consideration *adequate*. The agreement must be *reasonable*. "We do not see (says Tindal, C. J., in Horner v. Graves, 7 Bingh. 743,) how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either; it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy. No certain precise boundary can be laid down, within which, the restraint would be reasonable, and beyond which, excessive. In Davis v. Mason, 5 T. R. 118, where a surgeon had restrained himself not to practice within ten miles of the plaintiff's residence, the restraint was held reasonable; and in one of the cases 150 miles was considered as not an unreasonable distance, where an attorney had bought the business of another who had retired from his profession. But it is obvious that the business of an attorney requires a limit of a much larger range, as so much may be carried on by corespondence or by agents. And unless the case were such that the restraint was plainly and obviously unnecessary the court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are, if nothing more appears to show them reasonable, bad in the eye of the law." In Horner v. Graves, an agreement that the defendant, a surgeon dentist, would abstain from practising within 100 miles of York was held void, on the ground that the distance rendered it unreasonable. Instances in which the distance has been held not too large, and the contract consequently reasonable, may be found in Chesman v. Nainby, Clerk v. Comer, Davis v. Mason, and Bunn v. Guy, above cited," Smith's L. C. 182, 3.

1636. MITCHELL v. WRIGHT, 1 Esp. 280.

A bill of particulars under the judge's order, should contain the credits as well as debits.

Oppo. Ryman v, Haight, 15 John. 222.

1637. MITFORD, p. 52.

Overruled, it was said, in Kelly v. Drummond, 1 Hogan, 369.

1638. MOAKLEY v. RIGGS, 19 John. R. 69.

Woodworth, J. (in Thomas v. Woods, 4 Cowen, 184:)—"The expression that a term should not have been lost, may be regarded in that case as an *obiter dictum*."

1639. 2 *MODERN*.

A case being cited from 2 Modern, *Holt*, C. J.—*in ira* said, "that no books should be published but what were licensed by the judges:" and on another occasion he spoke of "those *scambling* Reports," that would make posterity think ill of his understanding, and that of his brethren on the bench.

1640. 3 MODERN,

Parke, J. (in 9 Bing. 361,) says, that the publisher of 3 Modern, observes in his preface, that 'some of the late reports (of course not meaning his own) are collected with very little judgment.'

1641. 4 MODERN.

Powell, J. 2 Ld, Raym, 1072,—'these scrambling reports; they will make us appear to posterity like a parcel of blockheads.'

1642. 6 MODERN.

"A book of no repute." Per Ld. Hardwicke, 1 Ves. 11. Ridgway, 126. *per curiam*—"not of the greatest authority or correctness."

1643. 8 MODERN.

"A miserable bad book." 1 Burr. 386, in marg. Vid. also 2 Burr. 1062. "The Court treated that book with the contempt it deserves." 3 Burr. 1326, in marg. Vid. also 7 D. & E. 239. Ld. Kenyon, in 7 T. R. 239, said, "nine cases out of ten in that book are totally mistaken." "A book of no authority." 2 Burr. 1062; 3 ib. 1326. Bayley, J. (in King v. Williams, 3 M. & Ry. 405:)—"Ld. Raymond, who decided Rex v. Harwood, (2 Ld. Raym. 1405,) is more likely to be correct than the editor of 8 Mod.—a book notoriously inaccurate and of no authority."

1644. 10 MODERN.

Said to be of little authority, per Ld. Mansfield, 1 Burr. 153, but he afterwards quoted the case of Parker v. Cook from it. Cowp. 178. Spoken slightly of, per Buller, J., Doug. 61.

1645. 11 MODERN.

"A book of no authority"—*arguendo* Cowp. 16; Vid. Doug. 61.

1646. 12 MODERN.

"Is not a book of any authority." Per Buller, J. Doug. 83. Vid. also Peake's Ev. 41.

1647. MOFFAT v. FARQUARHARSON, 2 Bro. C. C. 338.

Denied in Leigh v. Thomas, 2 Ves. 312, n.; see Calv. on Part. in Eq. p. 24.

1648. MOGADORA v. HOLT, 1 Show. 318; 12 Mod. 15 S. C.

S. P. as in Butler v. Pray, (ante).

1649. MOLLET v. BRAYNE, 2 Camp. 103.

Doubted it seems in Whitehead v. Clifford, 5 Taunt. R. 518—Gibbs, C. J.:—"As to the case in Campbell, it is very different from this, and we do not throw out any opinion against it; but when the like circumstances arise, it will be proper to consider them."

1650. MOLLOY ——'Not usually placed in the first class of authority upon maritime subjects'—Ld. Stowell, in 1 Hagg. Ad. R. 321; 'Molloy casts a rapid glance over the law concerning bills of exchange, but this part of his work is far inferior to the treatise of Marius.'—3 Kent C. 126.

1651. MOLLOY and MALINES.

"Almost any thing may be proved by citations from them." Per Ld. Mansfield, 2 Burr. 690. 'That part of Malines relating to bills of exchange is brief, loose and scanty; but it contains the rules and mercantile usages prevailing in England and other commercial countries in the time of the author. 3 Kent. C. 125.—But Mr. J. Johnson, (in 3 Pet. 236,) says: 'Malines' book unites the commendations of antiquity, good sense, and practical knowledge.'

1652. MONPRIVATT v. SMITH, 2 Camp. 175.

To trespass for breaking and entering a house, *staying therein three weeks*, and carrying away goods, the defendants pleaded, 1st, Not guilty; 2nd, As to breaking, and entering, and staying *twenty-four hours parcel of the three weeks*, and also as to carrying away the goods, a justification under a *fieri facias*. Replication to the last plea, admitting the writ, *de injuria sua propria absque residuo causæ*. The defendants proved the justification, but it

appeared that they stayed in the house more than twenty-four hours. Garrow and Wigly, for the plaintiff, submitted that the excess stood merely on the plea of not guilty, and that the plaintiff was entitled to a verdict in respect of it. But Lord Ellenborough ruled, that if the plaintiff intended to rely on that excess, he should have done so by a new assignment.

"In a learned note to this case the reporter cites Taylor v. Cole, 3 T. R. 292; 1 H. Bl. 555; Dye v. Leatherdale, 3 Wils. 20; Fisherwood v. Cannon, 3 T. R. 297; Gates v. Bayley, 2 Wilson, 313; and deduces from them, as a general principle, that "where the defendant answers what may reasonably be considered the gist of the trespass described in the declaration, it will be presumed, that the action is carried on only for that which the defendant has thus attempted to justify, unless the plaintiff intimates, by a new assignment, that the defendant has overlooked a part of the grievances he complains of, or has altogether misapprehended his meaning." But if there be several trespasses alleged in one and the same count in the declaration, and the defendant plead *not guilty* to some, and specially to others, and at the trial prove his special plea; still, if the plaintiff prove the several distinct acts of trespass stated in the declaration, he must have a verdict for as much as is not covered by the special plea. Stammers v. Yearsley, 10 Bing. 37; Bush v. Parker, 1 Bing. N. S. 732; Phillips v. Howgate, 5 B. & A. 220. The difficulty in these cases is in deciding whether the matter excluded from the plea of justification forms a distinct wrong, or is only in aggravation of what the special plea professes to justify. In Bush v. Parker, the action was in trespass for assaulting the plaintiff, seizing, pulling and dragging him, forcing him into a pond, and there imprisoning him.—Pleas: 1. *Not guilty*; 2. As to the assaulting and seizing, and a little pulling and dragging the plaintiff, a justification in defence of possession. The jury having found the defendants guilty on the first issue, and a verdict for them on the second, it was moved to enter judgment for them on the whole record, but the Court of Common Pleas refused: "I agree," said Tindal, C. J., "in the rule of law, that where, in trespass, the defendant pleads a justification going to the gist of the action, it is not necessary to include that which is mere matter of aggravation; and this brings us to the application of the rule, and to the inquiry whether it will serve the defendants or not; and we have only to look at the pleadings here, and to apply our common sense to the allegation, that the defendants dragged the plaintiff through the pond, to see that it is a distinct and substantive trespass, and not part of the assault of which the plaintiff first complains." Lord Loughborough, in Taylor v. Cole, uses some language cited by the Chief Justice in Bush v. Parker, which may prove useful in distinguishing between statements of aggravation and statements of several trespasses, such as that in the latter case. The declaration was for breaking and entering the plaintiff's house, and expelling him. Plea—justifying the breaking and entering only. "Undoubtedly," said his Lorship, "to enter into a house, and to expel the possessor, may be distinct acts, and they may be also connected. But where the plaintiff charges them as parts of one trespass, as is the case in this declaration; and the defendant sets forth a justification to the principal act, the entry; it is just that the plaintiff should, either by replication or new assignment, state, that he insists upon the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not, it is just to consider it only as matter of aggravation." Per Smith's L. C. p. 59, 60.

1653. MONRAVIA v. LEVY, 2 T. R. 483, note.

Doubted in Bowes v. French, 2 Fairf. R. 182, 5—Weston:—"The

note of Monravia v. Levy, is very brief. It was at N. P. before Buller, J. The defendant had covenanted to account. He did so; and a balance was struck, which he expressly promised to pay. Upon this promise, Buller, J. sustained assumpsit; probably upon the ground that the covenant was fulfilled."

1654. MOODY v. PENDER, 2 Hayw. R. 29.

That the defendant, in an action for a malicious prosecution, may give in evidence what he swore on the trial of the indictment.

Doubted in M'Rae v. Oneal, 2 Dev. R. 171.

1655. MOONEY v. LLOYD, 5 S. & R. 412.

That an attorney cannot recover a compensation for his services beyond the attorney's fee allowed by statute.

Overruled in Gray v. Brackenridge, 2 Penn. R. 75.

1656. MOOR v. BLAGRAVE, 1 Ch. Cas. 277.

Doubted in Trecothick v. Austin, 4 Mason's R. 41, 44—Story, J.

1657. MOOR v. HATHWAY, 3 Conn. R. 528.

In Connecticut a witness is protected from answering a question that would charge him with a debt.

Oppo. Bull v. Lovering, 10 Pick. 9; Naylor v. Semmes, 4 G. & J. 273.

1658. MOOR v. WATTS, 1 Ld. Raym. 614.

"In replevin for cattle with *ad hunc detinet*, damages given for the cattle, will change the property."

Oppo. S. C. 12 Mod. 428:—"In replevin for cattle with an *ad huc detinet*, and defendant has judgment against him for damages, by payment thereof, the property of the distress shall be vested in him." See Smith v. Gibson, (post).

1659. MOORE v. COLLINS, 3 Dev. R. 126.

A deed by reason of the death of the register was not registered within six months, (the time limited by stat.) but was registered as soon as a successor was appointed; held, that the deed was available, as if duly registered.

Overruled, in S. C. 4 Dev. R. 384.

1660. MOORES v. HUISH, 5 Ves. 693.

Overruled in effect in Wagstaff v. Smith, 9 Ves. 920; Sturgis v. Corp, 13 Ves. 190; Essex v. Atkins, 14 Ves. 342; See Clancy on Married Women, 118. 123; Sugden on Powers, 106.

1661. MORAVIA v. SLOPER, 2 Com. Rep. 573.

Reported briefly and inaccurately in Comyn. Better stated in Willes, 30.

1662. MORDY v. JONES, 4 B. & A. 394.

Doubted in Amer. Jurist, (8 V. p. 353. Oct. No. 1832.)

1663. MORGAN v. BIDGOOD, 1 Price, 61.

Oppo. Hockin, (misprinted ;) Dockett v. Reed, 1 Tyrwh. 386.

1664. MORGAN v. LEWIS, 4 Dow's P. Cas. 29.

Explained in Hickson v. Aylward, 3 Moll. 14.

1665. MORGAN v. RICHARDS, 1 Browne's Penn. R. 171.

Decides that a contract or *sale* made on *Sunday* is void at common law.

Denied in Drury v. Defontaine, 1 Taunt. 131. The court in Delamater v. Miller, 1 Cow. R. 75, say, 'the defendant was not bound to regard the demand made on Sunday.'

1666. MORGAN v. RICHARDSON, 1 Camp. N. P. 40, n.; Tye v. Gwynne, ib. 346; Mann v. Lent, 10 B. & C. 877.

In an action on a bill of exchange, a partial failure of consideration is no defence, although the suit is between the original parties; otherwise of a total failure.

Oppo. Hills v. Banister, 8 Cowen, 31. See 2 Phil. Ev. p. 8. notes; Christy v. Reynolds, 16 S. & R. 258.

1667. MORÖE v. WILSON, 6 Monroe R. 124.

It was said, the court could not conceive, under what law, or according to what precedent, a judgment *quando* could be rendered against heirs;—" for there cannot be a supposed case of assets descending to them from time to time. They (heirs) take all at once on the death of the ancestor, or not at all."

Overruled in Wells v. Bowling's Heirs, 2 Dana's R. 41.

1668. MORRELL v. JOHNSON, 1 Hen. & Munf. 449.

S. P. as in Smith v. Gibson, (post).

1669. MORRICE v. ANTROBUS, Hardr. 325.

That if a corporation aggregate make a lease not warranted by statute, it is void against themselves.

This depends on the fact whether such corporation has a head, or principal person, as dean, &c. or not. In the former case the lease would be good for life of the dean, &c., in the latter, not. Co. Lit. 45 a. n. 4. Armiger v. Bp. of Norwich, Cro. El. 690.

1670. MORRIS v. BRANDON, Bull. N. P. 77.

Ld. Mansfield said—there can be a patent for an addition.

Explained in Boulton v. Bull, 2 H. Bl. 489. Buller, J.—"Since that time it has been the general received opinion in Westminster Hall, that a patent for an addition is good, but then it must be for the addition only, and not for the whole machine." See Hornblower v. Boulton, 8 T. R. 95.

1671. MORRIS v. JONES, 3 Dowl. & Ry. 605.

It was held that, where the parties agreed that execution might issue upon the judgment, after the year and a day from the signing the warrant, without a *scire facias* to revive it, he cannot afterwards set up the illegality of the proceeding.

Doubted in Heath v. Brindley, 2 Adol. & Ellis, 370; and it would seem overruled.

1672. MORRIS v. MILLER, 4 Burr. 2057.

In actions for *crim. con.* "there must be evidence of a marriage in fact; that acknowledgment, cohabitation, and reputation, are not sufficient; and that in prosecutions for bigamy also, a marriage in fact must be proved."

Denied in Commonwealth v. Murtagh, Ashmead's R. 272; Forney v. Hallacher, 8 S. & R. 158. It seems also by Mellen, C. J. in Cayford's case, 7 Greenl. R. 57, in respect to cases of bigamy. See (post) People v. Humphrey, Trueman's case; and see also (ante) Commonwealth v. Littlejohn, 15 Mass. 163; Rosc. Cr. Ev. 229; 2 Stark. Ev. 653, *et seq.*

1673. MORRIS v. STEPHENSON, 7 Ves. 474

S. P. as in Hall v. Hardy, (ante).

1674. MORRIS' LESSEE v. VANDEREN, 1 Dall. 64. (Aleyn, 18).

M'Kean, C. J. said—'that the court has a discretionary power to admit circumstantial evidence of the existence of a record.'

Denied in Adams v. Betz, 1 Watts, 428; The cases referred to, 'will not be found to militate against the doctrine, that a record cannot be contradicted, and must be tried by itself, when in existence.'

1675. MORSE v. JAMES, Willes, 122.

Ld. C. J. Willes controverts the general position in Britton v. Cole, 1 Salk. 409, that an officer's aid may justify as the officer himself may, and takes a distinction between civil and criminal process.

But Ld. Ellenborough denies this distinction, and affirms the general position in Salk. Vid. Grant v. Bagge, 3 East, 132.

1676. MORSE v. ROYAL, 12 Ves. 355.

Denied in White v. Westmeath, 2 Moll. 177, but see the observations of Chan. Kent in 2 J. Ch. 265.

1677. MOSES v. M'FERLAN, 2 Burr. 1010.

Several times questioned; particularly by Eyre, C. J. and in Marriot v. Hampton, 7 D. & E. 269, and by Heath, J. in Brisbane v. Dacres, 5 Taunt. 143.

Denied as to the refusal of interest in the action for money had and received, in 11 Mass. 504, and the cases there cited. Vid. also Comyn on Contracts, 50.

1678. MOSES v. STEVENS, 2 Pick. 232.

Denied in Weeks v. Leighton, 5 N. H. R. 344. The Court say:—"In England & New York, the law is held to be otherwise—that although the infant may avoid the contract and relieve himself from the burthen of completing it, yet he cannot recover any compensation for what he has done under it, nor recover back what he may have paid. 8 Taunt. 508; 8 Cowen, 84; 7 ib. 184."

1679. MOSELEY v. BOOTHBY, 3 Bing. R. 107.

That the collateral *guarantee* is void unless it be in writing and signed, and be given upon a sufficient consideration, and such consideration appear on the face of the guarantee, according to the *St.* of Frauds.

Decided differently in Massachusetts, Maine, Conn. & Virginia, (17 Mass. 122; 4 Greenl. 180, 387; 6 Conn. 81, and 5 Cranch, 151.

1680. MOSLEY'S REPORTS.

"Mr. Impey cited Horsley's case from Moseley's Reports; which book Ld. Mansfield told him he should not have quoted." 5 Burr. 2629. Vid. also 3 Anstr. 861; 5 D. & E. 560.—Lord Eldon, however, 1 Merivale, 92.—'I myself think very differently from Lord Mansfield on that subject, having always considered Moseley's Reports as a book possessing a very considerable degree of accuracy.' 'Lord Eldon is presumed to have been a better judge of the merits of the work' than Lord Mansfield. 1 K. C. 460.

1681. MOSS v. BRYROM, 6 T. R. 379.

Qualified in Phyn v. Royal Exchange Ins. Co., 7 T. R. 505. See also 2 Wash. C. C. R. 67.

1682. MOSS v. CHARNOCK, 2 East, 399.

That if bankruptcy of the vendor intervenes between the execution of the bill of sale and the delivery of the ship, the vendee loses the ship.

Wood, B. said—"With great deference to that authority, I cannot

agree to it. I think the property passes instantly by the bill of sale." Hubbard v. Johnstone, 3 Taunt. 208.

1683. MOSS v. GALLIMORE, Doug. 279.

That a mortgagee, after notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of notice.

The Court of K. B. is said to have afterwards somewhat doubted the propriety of this decision. Powell on Mortg. 231, 2. But, where a lessor, after the execution of the lease, mortgaged the premises, it was held that he could not afterwards maintain ejectment for a forfeiture. Doe d. Marriott v. Edwards, 5 B. & Ad. 1065. This is the situation of a tenant who comes in under the mortgagor *before* the mortgage. However, the case of a tenant who has entered under the mortgagor *subsequently* to the mortgage is involved in more difficulty. See Alchorne v. Gomme, 2 Bing. 54; in Pope v. Biggs, 9 B. & C. 245; Waddilove v. Barnet, 4 Dowl. 348; the law was considered as settled, that 'a tenant who comes into possession under a demise, from a mortgagor, after a mortgage executed by him, may consider the mortgagor his landlord, so long as the mortgagee allows the mortgagor to continue in possession and receive the rents, and that payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle him to receive the rents.' So, in Vallance v. Savage, 7 Bing. 595, the mortgagor was treated as the mortgagee's agent, if he think fit to adopt him as such, in a case arising between trustee and *cestui que trust*. See Megginson v. Harper, 4 Tyrwh. 100; But see Pope v. Biggs, (post).

1684. MOSS v. MOORE, 18 John. R. 129.

Overruled in Pardee v. Blanchard, 19 John. R. 442.

1685. MOUNT v. WARDELL, 7 John. R. 434; and Campbell v. Richardson, 10 John. R. 406.

S. P. as in Juhel v. Church, (ante).

1686. MOYLE v. EWER, 2 Bulstr. 184.

It was laid down by Coke, C. J. that if a person sow the ground, and is afterwards deprived, or doth resign, if the corn was not severed at the time of the successor's coming in, he shall have the tithe. The same doctrine is stated in Degge, ch. 2, p. 2, and 1 Gibson's Codex, 661.

But in Bulwer v. Bulwer, 2 Barn. & Ald. 470, the court overruled the doctrine, saying "the authorities cited (meaning the above) are much too loose for the Court to act upon in opposition to so old and so established a rule of law."

1687. MULLINER v. WILKES, E. 23 G. 3, B. R.

Denied per Buller, J. in Hedges v. Sandon, 2 D. & E. 439.

1688. MUMFORD v. CHURCH, 1 J. Cas. 147.

The right to abandon is to be decided by the information of the assured at the time of the abandonment; and is not to be affected by the actual state of the property when the offer to abandon is made.

Overruled in Rhinelander v. Penn. Ins. Co., 4 Cranch, 29; Peele v. Merchants' Ins. Co., 3 Mason, 27, and cases cited; Humphrey v. Union Ins. Co., 3 ib. 429; Dickey v. Amer. Ins. Co., 3 Wend. 658; 4 Cow. 222, S. C.; Church v. Pedient, 1 Cai. Ca. in Err. 21; Queen v. The Union Ins. Co., 2 Wash. C. C. R. 335; Maryland Ins. Co. v. Bathurst, 5 G. & J. 159.

1689. MUNROE v. HOWE, 1 Chit. R. 171.

Ld. Tenterden observed, "this may be a bill of trespass, and not upon promises. It is quite clear the particular cause of action must be expressed in the *ac etiam* clause."

Denied in Anonymous, 1 Dowl. Pr. R. 155—Patteson. The reporter must have mistaken Ld. Tenterden.

1690. MUNTORF v. MUNTORF, 2 Rawle, 180.

An executor must pay costs where there is a verdict for defendant, or he is nonsuit, although he was obliged to sue in his representative character; there being no difference whether the cause of action arose before or after the death of the testator.

Doubted. See Kline v. Guthart, 2 Penn. R. 490.

1691. MURGATROYD v. CRAWFORD, 3 Dall. 491.

Overruled—"The case of Murgatroyd v. Crawford, 3 Dall. 491, cannot be deemed authority, for it was overruled in Duncanson v. M'Lure, 4 Dall. 308;" Per Story, J. in 4 Mason, 394.

1692. MURLESS v. FRANKLIN, 1 Swans. R. 17.

Ld. Eldon:—That possession, taken by a father at the time of a purchase in his son's name, showed the father's intention to purchase for his own use.

Doubted in Matth. on Presump. Ev. 68—"too general in not being restricted to the case of an adult child, but it seems opposed, in the general principle, to preceding *dicta* and judicial determinations."

1693. MURRAY v. GOUVERNEUR et al., 2 J. Cas. 441.

In an action for the mesne profits, repairs made may be claimed as set-off; the action being an equitable action, and will allow of every kind of equitable defence.

Denied in 2 K. Com. 234, 235 :—" These were extra-judicial *dicta*." See Jackson v. Loomis, 4 Cow. 168; Nelson v. Allen, 1 Yerg. R. 360.

1694. MURRAY v. RIGGS, 15 John. R. 571.

Ch. J. Thompson held, that " the grantors having reserved to their own use, for their maintenance and support, a part of the property covered by the deed, forms no objection to the appropriation of the residue." (2 Vern. 510, & 5 T. R. 424.)

Doubted in Macie v. Cairnes, 5 Cowen, 530; Savage, C. J. observes, that the cases cited, seem not to support the doctrine laid down. (Austin v. Bell, 20 J. R. 442.) See 2 K. C. 535. n. (e).

1695. MURRAY v. THE UNITED INS. CO., 2 J. Cas. 263.

S. P. as in Mumford v. Church. (ante).

1696. MUSSELBROOK v. DUNKIN, 9 Bing. 605.

Tindal, C. J. said, " that an award is published when the parties have notice that it is within their reach on payment of such expenses as are *just and reasonable*."

Overruled in Macarthur v. Campbell, 5 B. & Adol. 518; Held, that an award is published when the arbitrator gives the parties notice that it may be had on payment of his charges; whether they be reasonable or not.

1697. MYER v. COLE, 12 John. R. 349.

A cause of action arising after the death of the testator, cannot be joined with one arising in his lifetime, although it is alleged that defendants, *as executors aforesaid*, &c.

Denied in Hapgood v. Houghton, 10 Pick. 154, and the contrary decided.

1698. NACKSTRAW v. IMBER, Holt N. P. C. 368.

Gibbs, C. J. held, that an implied promise was sufficient to enable one partner to recover at law from his co-partner on what appears to be due on a balance struck.

Doubted. Fromont v. Coupland, 2 Bing. 170; 9 B. M. 319.

1699. NAISH v. TATLOCK et al., 2 H. Bl. R. 319.

Overruled in Gibson v. Courthorpe, 1 Dow. & Ry. 206: Held, that the assignees of a bankrupt were liable in an action for use and occupation for the rent of a whole year, though the premises had been occupied by the bankrupt, previous to their appointment, during a part of the year.

1700. NAYLER v. ———, 1 Freem. 192, last point.

Overruled. Mayor of London v. Cole, 7 D. & E. 583; 1 Saund. 248. n. acc.

1701. NEALE v. LEDGER, 16 East, 51.

Overruled In the Matter of Casell, 9 B. & C. 624. Held, that two arbitrators in choosing a third must make it a matter of choice, not of chance.

1702. NEILSON v. M'DONALD, 6 J. Ch. R. 212, 213.

Reversed in M'Donald v. Neilson, 2 Cowen, 141.

1703. NELSON v. DIXIE, Cases Temp. Hardw. 305. (1736).

Ld. Hardwicke says, "An action for words may either lay the particular words spoken, or may set out the substance of the words spoken; and if the substance only be set out, as, &c., that it is sufficient to prove the substance of the words, and that was Haylay's case."

Overruled by Lord Ellenborough, (Cook v. Cox, 3 M. & Selw. 110.) A late case, (Whiting v. Smith, 13 Pick. 364,) recognizes Ld. Hardwicke's doctrine; and affirms that such always has been the practice in that commonwealth, as appears from the precedent (Amer. Prec. Dec. ed. 1810, 308, 309, drawn by Parsons and Jackson.) See M'Connell v. M'Coy, 7 S. & R. 223.

1704. NELSON'S LUTWYCH.

"There are many other grievances, among which may be reckoned such books as *Nelson's Lutwych*—a book which deserved public censure, at least, as being a reproach and dishonor to the profession and rather adapted to Billingsgate than Westminster Hall." Pref. to 18 Vin. Ab.

1705. NELSON v. WHITTALL, 1 B. & A. 21.

Bayley, J. referring to the opinion of Ld. Kenyon, in Wallis v. Delancy, 7 T. R. 266, n. that the handwriting of the obligor of a bond ought to be proved; the witness being dead.

Overruled in Page v. Mann, 1 Mo. & M. C. 79; Doe d. Wheeldon v. Paul, 3 C. & P. 613; Kay v. Brookman, 1 Mo. & M. 286; 3 C. & P. 555; Mitchell v. Johnson, 1 M. & M. 176.

1706. NELTHORPE v. DONINGTON, 2 Lev. 113.

Doubted. See 4 Dougl. R. 20, n. (a).

1707. NESBITT v. LUSHINGTON, 4 D. & E. 783.

What Buller, J. is made to say, that as to the articles enumerated in the memorandum at the foot of the policy, the insured could not re-

cover for any partial loss, unless it were the *direct* and *immediate* consequence of stranding, is denied in Burnett v. Kensington, 7 D. & E. 210.

1708. NEWBURY v. COLVIN, 8 B. & C. 166; 2 M. & R. 47.

Reversed in S. C. in 1 Cr. & Jerv. R. 192.

1709. NEWCOMB v. BONHAM, 1 Vern. 7.

A mortgage is made redeemable during the life of the mortgagor only, yet his heirs shall redeem. And in this case the mortgagor may be foreclosed in his own life-time.

Reversed in Bonham v. Newcomb, 1 Vern. R. 331. (case 232).

1710. NEWLIN v. NEWLIN, 1 S. & R. 275.

Overruled in Lancaster v. Dolan, 1 Rawle R. 231, 248—Gibson, C. J. :—"Notwithstanding the case of Newlin v. Newlin, (1 Serg. & Rawle, 275), which was hastily determined on an exception to evidence, we are entirely prepared to adopt the conclusions of Chancellor Kent, in The Methodist Epis. Ch. v. Jaques, 3 J. Ch. R. 108, that the English decisions are so floating and contradictory, as to leave us at liberty to adopt the true principle of these settlements; that instead of holding the wife to be a feme sole to all intents as regards her separate estate, she ought to be deemed so only to the extent of the power clearly given in the conveyance."

1711. NEWLAND v. OSMAN, 1 Bott's P. L. 4 ed. 460.

Debt on bond conditioned to indemnify the parish against the support of a bastard child. Plea that the defendant offered to take the child to maintain, he being the putative father, and that the overseers refused: and held good.

Doubted in Strangeways v. Robinson, 4 Taunt. 498.

1712. NEWMAN v. CARTONY, 3 Bro. Ch. Ca. 346, in note.

Overruled—as in Ellis v. Atkinson, ante.

1713. NEWMAN v. WALLIS, 2 Bro. C. C. 143.

Ld. Thurlow *held*, that a plea of "no heir" was bad without averring who was the heir.

Overruled in Hall v. Noyes, 3 Bro. C. C. 483. See Hardman v. Ellames, 2 M. & K. 732. (8 Cond. 207).

1714. NEWTON v. REID, 4 Simons' R. 141.

Testator gave a sum of money for the separate use of his daughter, a *feme sole*; and declared that she should not be at liberty to sell or dispose of it, and, if she attempted so to do, that such sale should be void.

The daughter afterwards married: Held, that the restraint on alienation was void, there being no gift over.

Denied in 2 Kent Com. p. 165, n. (a).—'it is not the law in this country.'

1715. NICHOLS v. GWYN, 1 Sim. 389.

Ld. Chan. I had great difficulty, but I yielded in Nichols v. Gwyn to the authority of Lord Eldon, in Shaw v. Lindsay, 18 Ves. 496, and of Ld. Thurlow, in Scott v. Hough, 4 Bro. C. C. 213. It now appears that these cases were misreported, and there is no authority for it. Johnson pet. Nagle res., 1 Moll. Ch. R. 244.

1716. NICHOLS v. RUGGLES, 3 Day's R. 145.

Overruled in Wheaton v. Peters, 8 Pet. R. 591.

1717. NICHOLS v. SKINNER, Prec. Chan. 528.

In Massey v. Hudson, 2 Merivale, 130, the Master of the Rolls said that, as reported, he could not acquiesce in that decision. And he afterwards said that on examining the Register's book, the case appeared to have been wholly misrepresented.

1718. NICHOLLS v. WEBB, 8 Wheat. R. 326.

Doubted in Pres. &c. of the Bank of Wilmington and Brandywine v. Cooper et al., 1 Harr. (Dela.) R. 10—Clayton, Ch. J.:—"I must be permitted to say a word as to the case of Nicholls v. Webb, 8 Wheaton, so far as it is considered an authority to establish the point that the entry on the record of a deceased notary's book "that due notice was given to the indorser" is to be taken as proof that legal notice was given. The book I would hold as evidence of all the facts it gives as to the time, manner, &c., of notice, by reason of his death. If we go further, we make the notary the judge of what is legal notice to fix the indorser. Now what is legal notice, is a question of law for the court, and not for the notary. He should note the facts; when he gave the notice; to whom; the mode, &c. These are *facts*, and his record would be sufficient to prove them; but the conclusion of the law, whether it is due or not, is for us to decide, and not him. If the case in Wheaton goes as far as it appears it did go, it has not my approbation as sound law."

1719. NICHOLSON v. COGHILL, 4 B. & C. 23.

Dictum of Holroyd, J., that in an action for malicious prosecution it has been held that evidence of the bill having been thrown out by the grand jury is sufficient to warrant an inference of the absence of probable cause.

Denied in Byne v. Moore, 5 Taunt. 187; 2 Phil. Ev. 256.

1720. NICHOLSON v. SEDGWICK, 3 Salk. 67.

Overruled in Grant v. Vaughan, 3 Burr. 1522.

1721. NICHOLSON v. SHERMAN, 1 Ch. Cas. 57.

Doubted in Holland v. Prior, 1 Coop. Sel. Cas. 426. (8 Cond. 490). as to the accuracy of the report.

1722. NICHOLSON v. WILLAN, 5 East, 506.

Doubted in Garnett v. Willan, 5 B. & Ald. 53, by Best, J.:—"I think that the authority of that case is considerably shaken by the case of Birkett v. Willan, (2 B. & A. 356.) where the decision of the court proceeded expressly on the ground that the carrier was liable for gross negligence."

1723. NICKLIN v. MORROW, 1 Const. R. (Tr. Ed.) 474.

Overruled in Breithaupt v. Clarke, 1 Hill's R. 399.

1724. NICOLL v. MUMFORD, 4 J. Ch. R. 522.

Reversed in Mumford v. Nicoll, 20 John. 611; see 2 Sto. Eq. 490.

1725. NICOLL v. NICOLL, in Chan. (1835, not reported.)

Reversed in S. C. 16 Wend. 446:—Held, that an attorney's lien for costs is no bar to a bill in Chancery filed to obtain a *set-off*, nor is it a bar when the question arises on a trial at law.

1726. NISI PRIUS REPORTS.

"It is impossible for any judge, to decide at once rightly upon every point that comes before him at N. P.; and Ld. Ellenborough in Campbell's Reports is wonderfully right in by far the most of the cases, beyond the proportion of any other judges." Per Mansfield, C. J., 5 Taunt. 196.

'Very likely one's first thoughts at N. P. may be wrong, and I am extremely sorry that they are ever reported; and still more so, that they are ever mentioned again.' Per Bayley, J., 1 Chit. R. 121.

'Certainly it is, *it is only a N. P. case.*' Per Ld. Mansfield, Doug. 697, note; vid. Scott v. McIntosh, (post).

1727. NOBLE v. KENNOWAY, Dougl. 510.

Evidence of particular commercial usages is admissible either to engraft terms into the contract, as in those cases concerning the time for which the underwriters' liability in respect of the goods shall continue after the arrival of the ship, or to explain its terms. See Ougier Walters, 3 Camp. 16; Bold v. Rayner, 1 Mee. & Welsb. 446; Powell v. Horton, 2 Bing. N. C. 668.

Qualified in Smith v. Wilson, 3 B. & Ad. 728. See also Hockin v.

Cook, 4 T. R. 314; 6 ib. 338; 11 East, 312; Cro. Eliz. 267; Smith v. Walton, 8 Bing. 238; Blackett v. Royal Exch. Ins. Co., 2 Tyrwh. 266; Roberts v. Barker, 1 Cr. & Mee. 808; Reading v. Menham, 1 M. & Rob. 236; Anderson v. Pitcher, 2 B. & P. 168; Cross v. Eglin, 2 B. & Ad. 106.

1728. NOKE'S CASE, 4 Co. 80—4th Resolution.

It was held, that an express covenant qualified the generality of an implied covenant, and restrained it by the mutual consent of the parties, so that it should not extend any farther than the express covenant.

Doubted in Proctor v. Johnson, 2 Brownl. 214, and in Croke's Report of the case, Cro. Eliz. 675, it is said that the case was decided against the plaintiff for other reasons; yet in Weiser v. Weiser, 2 Whart. R. 284, Kennedy, J. says—'the authority of Noke's case upon this point has been recognized in many cases, and is now considered an established rule of law.'

1729. *NOLLE PROSEQUI.*

One of the leaders of a set of fanatics known by the title of French prophets having been committed by Ch. J. Holt's warrant for some seditious language, one Lacy, another of the fraternity, called at his house and desired to see him; and when told that he was unwell, said he must see him, for he came to him from the Lord God. The Ch. Justice hereupon ordered Lacy in, and asked him his business. 'I come said he from the Lord, who has sent me to thee, and would have thee grant a *nolle prosequi* for John Atkins, his servant, whom thou hast sent to prison.'—'Thou art a false prophet and a lying knave,' answered the Ch. J.;—'for if the Lord had sent thee, it would have been to the Atto. General, for he knows it is not in my power to grant a *nolle prosequi*;' but I can grant a warrant to commit you to bear him company;' which he did. Lond. Law Mag.

1730. NORDEN v. WILLIAMSON, 1 Taunt. 378; 1 Stark. Ev. 580.

A plaintiff was by *consent* of the defendant allowed to be examined upon oath as a witness in the cause, although he came to defeat the claim of a co-plaintiff.

Doubted. Supervisors of Chenango v. Birdsall, 4 Wend. 453; Schermerhorn v. Schermerhorn, 1 ib. 119; See also 1 Phil. Ev. p. 69, note 122. But see also 1 Phil. Ev. p. 73, note 129: and 1 Phil. Ev. p. 74, note 134.

1731. NORDEN'S CASE, Sir Tho. Jones, 88; 3 Keb. 778.

That an execution against the goods of the executor for debt *in jure proprio* is a *devastavit, nolens volens.*

Cited and denied, 4 D. & E. 630. 649.

1732. NORMAN v. COLE, 3 Esp. 253.

That a sum of money placed in the hands of a defendant to procure a pardon, could not be recovered.

Oppo. Wilkinson v. Kitchen, 1 Ld. Raym. 89; Aubert v. Maze, 2 B. & P. 371; Cannan v. Bryce, 3 B. & A. 179. The distinction between *malum prohibitum, and malum in se* disapproved of.

1733. NORRIS v. INS. CO. OF NORTH AMERICA, 3 Yeates, 84.

The written instructions or order to make insurance are admissible to control and explain the expressions in the formal policy; and the mistake of the scriviner or clerk may be rectified thereby.

Denied in Higginson v. Dall, 13 Mass. R. 96.

1734. NORTH v. CROMPTON, 1 Ch. Ca. 196; Forr. 268; 3 P. Wms. 193.

Doubted in Kellett v. Kellett, 1 Ball & Beat. 543: "It is a very short report and not to be reconciled with the later decisions."

1735. THE MARQUISS OF NORTHAMPTON'S CASE, 3 Leon. R. 71; 4 Leon. 17; Dyer, 357 a; 2 Bro. Abr. 261.

Reported imperfectly in 3 Leon. 71. See Sug. on Pow. 202, and notes 1 and 2.

1736. NORTHAMPTON (LORD'S) CASE, 12 Coke, 134, (4th Res.)

It is a good defence to an action for slander, for a defendant to show he heard it from another, and at the time named the author.

Overruled in M'Pherson v. Daniels, 10 B. & C. 263; Ward v. Weeks, 7 Bing. 211; De Crespigney v. Wellesley, 5 Bing. 392. And extended to a libel as well as oral slander. See Dole v. Lyon, 10 J. R. 449; Miller v. Kerr, 2 M. C. & R. 285.

1737. THE NORTH RIVER STEAMBOAT CO. v. HOFFMAN, 5 J. Ch. R. 300.

Overruled in 9 Wheat. 1.

1738. NORTON v. SIMMES, Hob. 12; Mo. 856; 1 Brownl. 64.

"And difference was taken between a bond made void by statute and by common law; for upon the statute of 23 H. 6, if a sheriff will take a bond for a point against that law, and also for a debt, due the whole bond is void, for the letter of the statute is so, for a statute is a strict law, but the common law doth divide according to common reason, and having made that void, that is against law, lets the rest stand."

Denied by T. M. in No. 20. Oct. 1833. Amer. Jurist, p. 243. It is there affirmed as the true principle—"If any part of a contract is valid, it will avail *pro tanto*, though another part may be prohibited by stat-

ute—*provided* the statute does not expressly, or by necessary implication, render the whole void—and *provided also*, that the sound part can be separated from the unsound. As to the possibility of separation, however, there is no difference between contracts against the common law, and against a statute." See cases cited, p. 244, *et seq.*

1739. NOY'S MAXIMS.

Barton in Elements, &c. p. 26, says :—'too much obsolete law to be safely intrusted in the hands of a noviciate :—He confesses that he once entertained different sentiments, but subsequent reflections have effected an alteration in his opinion of the merit of that work.' But, Ch. J. Kent, (2 R. C. 554) says—" A collection of reputation and authority, applicable to every general head of the law." And Roscoe's Lives, 414, ' Noy was a very industrious and learned man.' ' With infinite pains,' says Howell, in his letters, ' he came to his knowledge of the law, but I never heard a more perfect anagram than was made of his name William Noy, *I moyl in law.*'

1740. NOY'S REPORTS.

This book is said to be a loose collection of notes, never intended by Noy for the public eye,"—&c. Co. Litt. 54. a. in note. And is called " a bad authority," per Buller, C. J. in Petrie v. Hannay, 3 D. & E. 418. and " of no credit," per Kent, C. J. 2 Johns. 72.

1741. NUGENT v. GIFFORD, 1 Atk. 463.

Shaken, 2 Dick. 724 ; Scott v. Tyler, 2 Bro. Ch. Ca. 431 ; M'Leod v. Drummond, 17 Ves. 153 to 172 ; See Sutherland v. Brush, (post). and Colt v. Lasnier, 9 Cowen, 320.

1742. NURSTIVE v. HALL, 1 Ventr. 10.

In 4 Dougl. 54 n. it said that this case ' seems to be an imperfect note of the same case with Thursby v. Plant, 1 Saund. 240; where it was held that covenant lay for the assignee at common law. See Saund. p. 240, n. 3, *contra.*

1743. OBITER DICTA.

Reporters do wisely that omit opinions that are delivered accidentally and which do not conclude to the point in question 1 Co. R. 50.—The points adjudged are to be observed and not matters of discourse, ib. 52.

1744. OCEAN INS. CO. v. FRANCIS, 2 Wend. 68.

In New-York it is settled law, that the sentence of a foreign court of admiralty condemning the property as a good and lawful prize, according to the law of nations, is conclusive to change the property, but

is only *prima facie* evidence of the facts on which the condemnation purports to have been founded; And in a collateral action, such evidence may be rebutted by showing that no such facts did, in reality, exist.

Decided differently in Crondson v. Leonard, 4 Cranch, 434; Dempsey v. Ins. Co. of Penn., 1 Binn. 299, n.; Baxter v. The New England Ins. Co., 6 Mass. 277; Stewart v. Warner, 1 Day, 143.

1745. OGDEN v. GIBBONS, 4 J. Ch. 150, 17 John. 488.—Steam boat case.

Overruled in Gibbons v. Ogden, 9 Wh. 1; See Hopk. 149; 3 Cowen, 714.

1746. OGDEN AND SAUNDERS, 12 Wh. R. 213.

Explained in Frey v. Kirk, 4 Gill & J. 509; and the ultimate opinion of the S. C. in the above case adopted.

1747. OGDEN v. TURNER, Salk. 696—Lord Holt.

To render words actionable, it is not sufficient that the party may be fined and imprisoned for the offence, if true; for, says he, there must not only be imprisonment, but an *infamous punishment*.

Doubted in Onslow v. Horne, 3 Wils. 177—De Grey. But in Skinner v. White, 1 Dev. & B. 471.—Held, that the charge to sustain an action, must impute an offence, to which is annexed an *infamous punishment*—thereby affirming the rule laid down by Lord Holt as the settled rule of law in North Carolina.

1748. OHL v. EAGLE INS. CO., 4 Mason, 172; 5 Rob. 138.

That a written document is the proper and necessary evidence of the title of transfer of a ship.

Oppo. Bixby v. Franklin Ins. Co., 8 Pick. 86; *and cases cited*; Ring v. Franklin Ins. Co., 2 Hall, 1.

1749. OLAND'S CASE, 15 Rep. 116 a.; Roll. Abr. Tit. "Emblements" vol. 1, p. 726.

Held, that if a lease be made to husband and wife during coverture, and the husband sow the land, and afterwards they be divorced *causa præcontractus*, the husband shall have the corn, "because the sentence which dissolves the marriage is the judgment of the law, and *judicium redditur in invitum*."

Doubted it *seems* in Davis v. Eyton, 4 Mo. & P. 820. 827—Gaselee: —"The only case cited is Oland's case, reported by Lord Coke, and also to be found in Cro. Eliz. 460. The report in Coke does not refer to any particular place where the judgment passed; but, in Croke,

it is not treated as a judgment that had actually passed; it is merely cited as a supposed case."

1750. OLIVER v. GRAY, 1 Har. & Gill, 204.

Any unqualified acknowledgment, &c. with no other excuse for not paying than a reliance on the bar created by the act of limitations, is sufficient to take the case out of the statute.

Overruled. Rowcroft v. Lomas, 4 M. & S. 458; Perly v. Little, 3 Greenl. 97; Exeter Bank v. Sullivan et al., 6 N. H. R. 124.

1751. OMYCHUND v. BARKER, 1 Atk. 45.

Denied in Butts v. Swartwood, 2 Cowen, 432, n. a. as to what Ch. J. Willes is reported to have said as to the admissibility of witnesses who 'do not believe in a God or future rewards and punishments.' Better reported in Willes' Reports. The following account of the principal case is extracted from 1 Wilson, 84. "It was held by the Lord Chancellor that an infidel, pagan, idolater, may be a witness, and that his deposition, sworn according to the custom and manner of the country where he lives, may be read in evidence." (See R. v. Taylor, Peake, 11, (post).

1752. ORBY v. MOHUT, 2 Vern. 531. 342; Prec. Ch. 257; 2 Freem. 291.

Best reported in 3 Ch. R. 56; See Sug. on Pow. 437, (L. ed.) p. 236,(Am. ed.)

1753. ORBY v. HALES, 1 Ld. Raym. 3.

That if the Justices at Sessions make an illegal order for discharge of poor prisoners, and the Sheriff discharge them, he is not liable for an escape.

"Cannot be considered as law." Per Ld. Kenyon in Brown v. Compton, 8 D. & E. 431. See also the Marshalsea case, 10 Rep. 76.

1754. O'REILLY v. The ROYAL ASSU. CO., 4 Camp. R. 246.

Overruled in Green v. Elmslie, Peake's R. 212—Kenyon. Levie v. v. Janson, 12 East, 653—Ellenborough. Scott v. Thompson, 4 B. & P. 181; Riggin v. Patapsco Ins. Co., 7 Har. & J. 290—Dorsey. See Stocker v. Harris, 3 Mass. 417.

1755. O'ROURKE v. PERCEVAL, 2 B. & B. 58.

S. P. as in Lawrenson v. Butler, (ante).

1756. ORRINGTON v. NEALE, 2 Stra. 819. 2 Ld. Raym. 1544.

Declaration that defendant & al. *conjunctim et divisim* promised, &c. held bad.

Contradicted by Rees v. Abbot, Cowp. 832.

1757. OSGOOD v. LEWIS, 2 Har. & G. 495.

Explained in Hyatt v. Boyle, 5 Gill & J. 111.

1758. OSGOOD v. MANHATTAN CO., 15 Johns. 167, 8; (1 Cow. 65.)

Reversed in 3 Cowen, 612.

1759. OSTERHOUT v. ROBERTS, 8 Cowen, 43; Curtis v. Groat, 6 John. 166. Jenk. Cent. 4, case 88, p. 189.

If the plaintiff brings an action of trespass or trover against the defendant to recover compensation for the loss of goods, and obtains a judgment covering the value of the goods; yet that the property of the plaintiff in the goods in such cases, is not changed, until the defendant shall have paid, or satisfied the judgment.

Oppo. Marsh v. Pier, 4 Rawle, 286, and the English cases there cited. Murrell v. Johnson's Adm., 1 H. & M. 449; Philbrick, 5 Greenl. 147; Broome v. Wooton, Yelv. 67; Campbell v. Phelps, 1 Pick. 62.

1760. OTHER v. CALVERT, 8 J. B. Moore, 239; 1 Bing. 275.

Overruled in Hart v. Cutbush, 2 Dowl. Pr. R. 456.

1761. OUTFIELD v. ROUND, 5 Ves. Jr. 508.

Where a purchase had been made for a meadow, without any notice of a footway around it and across it, Ld. Rosslyn decreed a specific performance, saying he could not help a purchaser, who did not choose to inquire.

Doubted by Ld. Manners in 1 Ball & Beat. 350. See also Bean v. Herzick, 3 Fairf. 267.

1762. OWEN v. GRANGER, 2 Day 477.—(1807).

That the legal title cannot be drawn in question, on a bill of forclosure.

Denied by Daggett, J. in Palmer v. Mead, 7 Conn. R. 164.—'The first time I ever heard a suggestion of the kind, was in Owen v. Granger, at Hartford, in 1802, when the Court, Judge Swift presiding, held, that usury could not be given in evidence on a bill of foreclosure. This was heard with astonishment, by several gentlemen of the profession, some of whom lived to witness his retraction of that opinion in his Digest of 1823.'

1763. OXLADE v. PERCHARD, 1 Esp. R. 287.

The bankrupt was competent to explain a doubtful act of bankruptcy.

Overruled in Rabbett v. Gurny, 1 Montague, 489; Chapman v. Gardiner, 2 H. Bl. 279. See Binns v. Tetley, 1 M'Clell. & Y. 397. But in Sayer v. Garnett, 7 Bing. 103: Held, that a bankrupt was not admissible either to support or defeat the commission.

1764. OXENDALE v. WETHERELL, 9 B. & C. 386.

Where by a contract of sale, the vendor agreed to deliver 250 bushels of wheat within a specific time, and delivered part, but not the residue: Held, that he might, after the time mentioned in the contract had expired, recover from the purchaser the value of the wheat delivered to and retained by him.

Overruled in Champlin v. Rowley, 13 Wend. 270.

1765. PACE v. MARCH, 1 Bing. 216.

S. P. as in Boehm v. Campbell, (ante).

1766. PACKWOOD v. MADDISON, 1 Sim. & Stu. 232.

Denied in Moffet v. Smith, 2 Moll. 359.

1767. PADELFORD v. PADELFORD, 7 Pick. R. 152.

Overruled in Sackett v. Sackett, 8 Pick. 309.

1768. PAGE v. FRY, 2 Bos. & Pul. 240.

Overruled in Bell v. Ansley, 16 East, 141, and Cohen v. Hannam, 5 Taunt. 101; see also Graves v. The Bolton M. Ins. Co., 2 Cranch, 441. Sed see Pacific Ins. Co. v. Catlett, 4 Wend. 75. 80, *et seq.*

1769. PAGE v. MANN, 1 M. & M. 79.

Proof of the hand-writing of the subscribing witness to an instrument is sufficient, he being dead, without any further proof of the identity of the parties, except the identity of name and description.

Overruled in Whitelocke v. Mann, 1 C. & M. 511; 3 Tyr. 541, S. C.

1770. PAGET v. PAGET, 2 Ch. Ca. 101; Brudnell v. Price, Finch. 365.

"From the reports in which they [the above cases] are found, and the positions they affirm, they are not entitled to any great attention." Per Sir Wm. Grant in Richards v. Chambers, 10 Ves. 580.

1771. PAINE v. BENSON, 3 Atk. 78.

Doubted by Ld. Thurlow in *ex parte* West, 1 Bro. C. C. 575, and Taylor, C. J. in M'Kay v. Hendon, 3 Murph. 26.

1772. PAINE, (JUDGE,) v. FOX, 16 Mass. R. 133.

That the words following a *vidilicet* in a declaration are never to be taken as an averment and are not traversible.

Denied in Hastings v. Lovering, 2 Pick. 223, and Gleason v. M'Vickar, 7 Cowen, 42.

1773. PAINE v. M'INTIER, 1 Mass. 69.

This was debt on an administrator's bond, brought to recover a dis-

tributive share of the estate, and interest was allowed from the time of the decree of the Court of Probate.

But this part of the case was overruled in Heath v. Gay, 10 Mass. 371.

1774. PALK v. CLINTON, 12 Ves. 58; Cockburn v. Thompson, 16 Ves. 326.

All persons interested in the subject of the suit, however numerous, ought to be parties.

Denied in Calvert's Tr. on Parties, p. 5 to 7. The rule :—"All persons having an interest in the object of the suit, ought to be made parties.

1775. PALMER v. HAND, 13 J. R. 434, and Haggerty v. Palmer, 6 J. Ch. R. 437.

"Where goods are sold, to be paid for on delivery, if on the delivery being completed, the vendee refuses to pay for them, the vendor has a lien for the price, and may resume the possession of the goods."

Denied in Chapman v. Lathrop, 5 Cow. R. 115, n. (a) where the reporter says "the dictum cited is certainly at war with the decision in the principal case, whatever may be said of Haggerty v. Palmer.

1776. PALMER v. HOOKER, 1 Ld. Raym. 727.

On non assumpsit, defendant gave in evidence that the debt was attached by foreign attachment in London, by J. S. vs. plf., and it was held he should prove that the plf. was indebted to J. S.

Denied per Ld. Ellenborough—"there must be some mistake in that report." Mc Daniel v. Hughes, 3 East, 367.

1777. PALMER v. MEAD, 7 Conn. R. 149.

On a bill of foreclosure, the title of the mortgagee cannot be investigated.

Denied in Cowles v. Woodruff, 8 Conn. R. 35, by Williams, J. who said;—'The case of Palmer v. Mead, is, indeed, in principle nearly allied to this; but decided, as it was, by a divided opinion, I cannot consider it as an authority for this case.'

1778. PALMER v. NEEDHAM, 3 Burr. 1389.

Special bail in an action of debt on judgment, discharged, the original debt being under £10.

Overruled in Lewis v. Pottle, 4 D. & E. 570.

1779. PALMER & WIFE v. HUGHES, 1 Blackf. R. 329.

If a note be made payable at a particular place, a demand of payment at such place, must be averred and proved.

Denied in Bowie v. Duvall, 1 G. & J. 175, and by the current of the cases in this country.

1780. PALMERSTON'S CASE, cited by Ld. Kenyon, 4 T. R. 290.

That what Ld. Palmerston swore upon a former trial was evidence, the witness having died in the interim; but the evidence was ultimately rejected, because the witness could not give the words, but only the fact.

Denied in Cornell v. Green, 10 S. & R. 16: See also Rowley's case, 1 Ry. & M. 111; Observations of Nelson, J. in Crary v. Sprague, 12 Wend. 45; Chess v. Chess, 17 S. & R. 411. Duncan, J. in Watson v. Gilday, 12 S. & R. 342:—"We have relaxed that strictness, and admitted a witness who would undertake to give evidence of the substance; but in that, there must be no equivocation or ambiguity." S. P. 5 Rand. 31. "It must be the words or the substance." The whole must be given—all or none. Per Henderson, J., in 3 Dev. R. 466. But see the observations in 14 Mass. 235.

1781. PARADYNE v. JANE, Aleyne, 26; Style, 47, S. C.

Where a party by *his own contract*, engages to do an act, the performance is not excused by an inevitable accident, or other contingency, although not foreseen by, or within the control of the party.

Denied in Shubrick v. Salmond, 3 Burr. 1639—Dunning, *arguendo*; and overruled in Pollard v. Schaffer, 1 Dall. 210—M'Kean. But Lord Alvanley in Touten v. Hubbard, 3 B. & P. 300; Lawrence, J. in Hadley v. Clark, 8 T. R. 267; Baylies v. Fettyplace, 7 Mass. R. 325; Fowler v. Bott, 6 ib. 63; 3 J. R. 45; and Doe v. Harvey, 8 Bing. 239, seem to recognize the doctrine of Paradyne v. Jane.

1782. PARIS v. SALKELD, 2 Wils. 137.

Plea of bankruptcy *puis le darrein continuance*, and held good.

Overruled in Tower v. Cameron, 6 East, 413; and Willan v. Giordiani there cited; Vid. also 2 Smith, 441.

1783. PARISH v. CRAWFORD, 2 Str. 1251.

Overruled in Frazer v. Marsh, 13 East, 238.—Ellenborough.—Master of the Trin. House v. Clark, 4 M. & S. 288; Abbott on Ship. p. 22; See also, Cowp. 143, and Soares v. Thornton, 7 Taunt. 627.

1784. PARISH v. STEVENS, 3 S. & R. 298.

Overruled in Waler v. Sherman, 8 S. & R. 357.

1785. PARKER v. ALFIELD, 1 Ld. Raym. 678; 1 Salk. 311; 12 Mod. 527.

Denied by Kent, Ch. J. in 11 John. R. 19, 20:—"This case is differently reported in the three books from which it is cited, and it is

badly reported in all, and is not entitled to much weight in support of the doctrine for which it is adduced."

1786. PARKER v. CONSTABLE, 3 Wils. 25.

Doubted it seems in Ellis v. Paige et al. 1 Pick. 47—Wilde, J.—"This is clearly the law, notwithstanding the case of Parker v. Constable, 3 Wils. 25, which is a short and imperfect report."

1787. PARKER v. KETT, 12 Mod. 472; 1 Ld. Ray. 661 S. C.

A dictum of Ld. Holt overruled. Whitehall v. Squire, Carth. 104. Mounfort v. Gibson, 4 East, 441.

1788. PARKER v. NORTON, 6 D. & E. 695.

Trover for a bill of exchange; and held that bankruptcy which happened after the conversion was no defence; but admitted it would have been a good defence, had the action been for money had and received.

Denied in Hatten v. Speyer, 1 Johns. 42.

1789. PARKER v. WINDHAM, Prec. Ch. 418.

Overruled, in effect, in Bond v. Simmons, 3 Atk. 20; Claney on Married women, 357.

1790. PARKER'S CASE, Hutt. 56.

Where *indicari* was written for *indictari* and held bad.

This case is shaken in 2 Hawk. 239; Queen v. Drake, 2 Salk. 660; Rex v. Beach, Cowp. 229.

1791. PARKHURST v. VAN COURTLANDT, 1 J. Ch. 279.

Reversed in 14 John. R. 15.

1792. PARR v. ELIASON, 1 East, 92.

Overruled in Loires v. Mazaredo, 1 Starkie, 385, and Chapman v. Black, 2 Barn. & Ald. 588.

1793. PARRAT v. CARPENTER, Noy, 64; S. C. Cro. Eliz. 502.

The imputation of adultery upon a clergyman was considered not actionable.

Doubted in Ayre v. Craven, 2 Ad. & El. 2:—Denman, C. J.—"Some of the cases have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress from the imputation of adultery, (Parratt v. Carpenter, Noy, 64; S. C. Cro. Eliz.); and a school mistress having been declared incompetent to maintain an action for a charge of prostitution. Per Twisden, J. in Wharton v. Brook, 1 Vent. 21.—"But, in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also set forth in what manner it was connected by the speaker with that profession." See

also Bayley, B.; in Lumley v. Allday, 1 Cro. and J. 305; S. C. 1 Tyrwh. 224.

1794. PARRY v. COLLIS, 1 Esp. 399.

In an action for words spoken against an attorney with reference to a former cause, the proceedings in that cause must be *proved*. Reported more fully in Peake's C. 47 :—Held necessary to *produce* the N. P. record, though it is not alleged that the cause was in fact tried.

1795. PARSONS v. WELLES & al., 17 Mass. 419.

Denied by Wilde, J. in 11 Pick. 297, as to the admission that 'a writ of entry might be maintained, in such a case, by the mortgagee;' 'but this admission was inadvertently made, and without adverting to the effect of the requiring in such a case a conditional judgment to be entered."

1796. PARTERICHE v. PAWLETT, 2 Atk. 383.

Ld. Redesdale doubted the *dictum* of Ld. Hardwicke, as to admitting parol evidence to add to a written agreement respecting lands; and said he had reason to know that this case was most imperfectly stated by Atkins. 1 Sch. & Lefr. 35.

1797. PARTRIDGE v. STRANGE, 1 Plow. 79.

Held, that a statute takes effect from the first day of the session, when no time was specified.

Overruled, or rather abolished every where by Statute.

1798. PASLEY v. FREEMAN, 3 Term 51.

Doubted by Ld. Ch. Eldon, in 6 Ves. jun. 184, 185 :—"The doctrine laid down in that case is in practice and experience most dangerous."

1799. PATERSON, Appt., and ELLIS' Ex'rs. *respond.* 11 Wend. R. 259.

Reversed in S. C. 259 and 671.

1800. PATRICK v. JOHNSON, Lutw. 259. 929.

Plea of *molliter manus imposuit* will not justify a battery.—*Semble.*

Denied in Rowe v. Tutte, Willes 16. The case is correctly reported 3 Lev. 403.

1801. PATTERSON v. TASH, 2 Str. 1178.

Questioned by the Court in Pickering v. Bush, 15 East, 38; Whitehead & al. v. Tuckett, 15 East, 400.

1802. PATTON'S LESSEE v. EASTON, 1 Wheat. 276.

Overruled in Green v. Lessee of Neal, 6 Pet. R. 291.

1803. PAWLET v. PAWLET, 1 Wils. 224.

'This case did not decide anything.' Sug. on Pow. p. 578, n. (1).

1804. PAYLER v. HOMERSHAM, 4 M. & S. 422.

Overruled in Britten v. Hughes, 5 Bing. 460—Gaselee, J.—*dissent.* Saying—" all the other cases are distinguishable from the present, except Payler v. Homersham, which appears to me to be directly in point, and to be overruled by the present decision."

1805. PAYNE v. HAYES, Buller, N. P. 145.

Overruled in Wicks v. Gordon, 2 Barn. & Ald. 335.

1806. PEACOCK v. PEACOCK, 2 Camp. R. 45.

Overruled in Reybold v. Jefferson, 1 Harr. (Dela.) R. 401 :—If a partnership be established, it is *prima facie* one of equal interests. See 16 Ves. 56.

1807. PEACOCK v. SPOONER, 2 Vern. 43. 195 ; 2 Freem. 124.

Frequently doubted. Lyon v. Mitchell, 2 Maddock Ch. R. 467. 483. 493.

1808. PEARPONT & LORD v. GRAHAM, 4 Wash. C. C. R. 234.

It was said to admit of serious doubt whether one partner *can*, without the consent of his associates, assign the whole of the partnership effects (otherwise than in the course of trade in which the firm is engaged).

Overruled in Deckard v. Case, 5 Watt's R. 24.

1809. PECK v. LOCKWOOD, 5 Day's R. 22.

The right of fishing for shell-fish, where the ground must be dug to take them, on land which is covered with water at high water mark, but which is above low water mark, may be exercised by every citizen.

Doubted. See 3 K. C. 416, n. (d).

1810. PECK v. SMITH, 1 Conn. R. 103.

When a highway is laid out under the statute, the adjoining proprietors can maintain trespass for an injury upon the highway in front of their land.

Doubted in Tyler v. Hammond, 11 Pick. 194. But the doctrine is maintained in Chatham v. Brainard, 11 Conn. R. 60. 82, *et seq.*—Williams.

1811. PEELE v. SUFFOLK INS. CO., 7 Pick. 254.

If a vessel is stranded, the underwriter is not obliged to accept the offer to abandon ; but may take her into his possession and repair her, the assured refusing to do it, and if he can do this at an expense less

than half her value, he may restore her to the assured, and thus avoid paying for a total loss.

Doubted in 2 Phil. Ins. 321. See also the observations of Chan. Kent, (in 3 K. C. 324, n. e).

1812. PEERE WILLIAMS, (3d Vol).

Lord Com. Shadwell: (2 M. & K. 732; 8 Cond. 215.)—"The cases in the third volume of Peere Williams are not of equal authority with those in the two preceding volumes which were published in his lifetime."

1813. PELHAM (SIR WM'S) CASE, 1 Co. 14 (b).

Overruled in Smith v. Clyfford, 1 T. R. 738.

1814. PELTIER v. SEWALL, 3 Wend. R. 269.

Overruled in S. C. 12 Wend. R. 386:—The Court say—"The distinction between an executed and an executory contract, does not appear on that occasion to have been sufficiently considered. As long as a special contract remains in force, neither performed nor rescinded, no recovery can be had under the general counts for any service performed under it; the action must be upon the contract itself. 14 John. R. 326; —19 ib. 205. But where the contract has been fully performed, and nothing remains to be done but the payment of the money, the common counts are all that it is necessary to insert in the declaration; the special agreement need not be noticed in the pleading." See 2 Phil. Ev. p. 109. (7 ed.)

1815. PENDLETON v. DYETT, 4 Cowen, 581.

Reversed in Dyett v. Pendleton, 8 Cowen 727: Held, that if the lessor bring lewd women under the same roof, though in an apartment not demised, to the disturbance of the tenant, he cannot recover rent.

1816. PENDLETON v. GRANT, 1 Eq. Ca. Ab. 230, pl. 2; 2 Vern. 517.

Overruled by Kelly v. Powlet, 1 Bro. C. C. 476, which decided that plate passed under a bequest of household furniture; refusing the evidence of the drawer of the will, who said it was *not* intended. Vid. 1 Sug. on Vend. p. 184, (Amer. ed.)

1817. PENNIMAN v. MEIGS, 9 J. R. 325.

Decided that a discharge, under the insolvent act of New York was a bar to all suits brought *there*, upon antecedent contracts, *wherever made*.

Overruled by Sturges v. Crowninshield, 4 Wheat. 122, and M'Killan v. M'Neil, ib. 209. These cases changed the law; and it is now settled, that a contract, made out of this state, cannot be discharged by

our insolvent laws. Sherrill v. Hopkins, 1 Cowen, 103; Wyman v. Mitchell, 2 Wend. 458.

1818. PENNINGTON v. ALVIN, 1 Sim. & Stu. 265.

Doubted in Nalder v. Hawkins, 1 Coop. Sel. Cas. 175, and the principle stated that should govern cases in which the motives of persons instituting suits as next friends are questioned.

1819. PENNY v. INNES, 1 Gromp. M. & Ros. 439.

Oppo. Birchard v. Bartlett, 14 Mass. R. 279.

1820. PENROSE v. CURREN, 3 Rawle, 351.

The plaintiff let his horse to defendant, an infant, to go to a particular place; the defendant went to a different place, and killed the animal by hard driving: Held, that defendant may plead his infancy in bar of the action for damages.

Decided differently in Campbell v. Stakes, 2 Wend. 137, where, however, there was no change of destination; and the horse was returned before it died. It was held that though case would not lie, trespass might be maintained. An able writer (Amer. Jurist, No. 22. Jan'y and April 1834) questions the soundness of this latter decision.

1821. PENTON v. ROBARTS, 2 East, 88.

The tenant has a right to remove fixtures, after his interest in the land terminates, if he has not yielded up possession.

Oppo. Poole's case, 1 Salk. 368; Davis v. Jones, 2 B. & Ald. 165; Lyde v. Russel, 1 B. & Ad. 394; Storer v. Hunter, 3 B. & C. 368.

1822. THE PEOPLE v. BERNER, 13 Johns. 384—17 ib. 391.

Denied in Sasscer v. Young et al., 6 Gill & J. 243—Chambers: Held, that a creditor may forbear during his pleasure the rigorous prosecution of his demand, reposing upon the faith of the security he has taken.

1823. PEOPLE v. HUMPHREY, 7 John. R. 314.

That a confession made by defendant of his first marriage, to a justice of the peace, when brought before him on a charge of bigamy, was not sufficient proof of a marriage in fact.

Denied in Commonwealth v. Murtagh, 1 Ashmead's R. 275.

1824. THE PEOPLE v. JANSEN, 7 John. R. 332.

That the plaintiffs, (The People) are chargeable with the consequences of the neglect of their agents.

Overruled in The People v. Russell et al., 4 Wend. 570; Vid. 9 Wheat. 720; 11 ib. 134; 12 ib. 505. Establishing the principle, that *laches* is not imputable to the government, and that statutory directions

to public officers, being directory form no part of the contract with the surety.

1825. THE PEOPLE v. THE JUSTICES OF CHENANGO, 1 J. Cas. 179.

Seems to deny to all courts of inferior jurisdiction the right to grant new trials on the merits, where that right is not given by the power instituting them.

Overruled in the People v. Stone, 5 Wend. 39 as to Courts of *oyer and terminer*.

1826. THE PEOPLE v. STONE, 5 Wend. R. 36.

The language of the Court seems in favor of the right to grant a new trial in capital cases.

Overruled in The People v. Comstock, 8 Wend. R. 549; See the observations of Story, J. 2 Sum. R. 57.

1827. THE PEOPLE v. THE UTICA INS. CO. 15 John. R. 334.

Doubted in Utica Ins. Co. v. Kip, 8 Cowen, 22, 3—Woodworth.

1828. THE PEOPLE v. WATERS, 1 J. Cas. 137; S. C. Col. Cas. 76.

Overruled in The People v. Brown, 6 Cow. 41; and affirming that the sheriff is liable to an attachment for the act of his deputy, the same as in a civil action.

1829. PEOPLE ex rel. PATCHEN v. SUPERVISORS OF KINGS COUNTY, 7 Wend. 530.

Overruled in The People v. Supervisors of Kings County, 16 Wend. 520.

1830. PERK. 192—204.

When a deed is to two or more and one dissents, the others are vested with the whole property.

Denied by Reeve, J. (in 4 Day. 401):—"It is an idea wholly inadmissible that when a deed is executed to two or more, and one dissents to the conveyance, the others are vested with the whole property. When a deed is executed to more persons than one, without designating in what proportions they shall hold, they must take in equal proportions; and the dissent of one cannot increase the proportions of the others. The moment that one dissents to the conveyance, it divests him of all title, but cannot operate to convey his share to the other grantees, but leaves it where it was before, viz., in the grantor."

1831. PERK. 96. b. tit. Devises, sec. 500.

"A devise by joint-tenant," &c. quoted 3 Burr. 1493. Denied in the sense there given it—and explained, 3 Burr. 1497.

1832. PERKINS v. BAYNTON, 1 Bro. R. 118.

A legacy to two jointly, is not a joint-tenancy.

Overruled in Campbell v. Campbell, 4 Bro. R. 15; Crook v. De Vandes, 9 Ves. Jun. 197; Jackson v. Jackson, ib. 591: Held, 'that a simple bequest of a legacy or a residue of personal property to A. & B. without more is a joint tenancy.'

1833. PERROT v. AUSTIN, Cro. El. 232.

Covenant by A. that he will do a certain act, or that his executor shall pay £20. He breaks his covenant and dies. Ruled that debt lies not against the executor.

Ld. Mansfield said this case was "an extraordinary one, in itself;" 3 Burr. 1383, and Wilmot J. was clear in opinion against it. ib. 1384.

1834. PEROTT v. CABLE, 1 Goulds. 173.

Reported incorrectly. See Sugden on Pow. 209, (Am. ed.)

1835. PETER v. COMPTON, Skinner, 353; (Acc. Wells v. Horton, 4 Bing. 40.)

"An agreement that is not to be performed within the space of one year from the making thereof" means, in the statute of frauds, an agreement which appears from its terms to be incapable of performance within the year.

Limited in Donellan v. Read, 3 B. & Ad. 809, where it was decided, that an agreement is not within the statute, provided that all that is to be done by one of the parties, is to be done within a year. In Birch v. Earl of Liverpool, 9 B. & C. 392, the defendant's wife hired a carriage for five years at 90 guineas per annum, which contract was, by the custom of the trade, determinable at any time on payment of a year's hire; the court held the case within the statute, and that the contract ought to have been in writing. And so must a contract for a year's service, to commence at a day subsequent to the making of the contract. Bracegirdle v. Heald, 1 B. & A. 722; Snelling v. Lord Huntingfield, 1 C. M. & R. 20.

1836. PETERBOROUGH (LORD) v. DUCHESS OF NORFOLK, 2 Freem. 264.

Imperfectly reported. Calv. on Part. in Eq. p. 195. n. (6).

1837. PETRIE v. HANNAY, 3 D. & E. 413.

S. P. as in Faikney v. Reynous & al., overruled, ante.

1838. PETTY'S CASE, Harp. 59.

Denied in State v. Hooper, 2 Bail. R. 37; and the rule laid down to be this: That where the officers of the bank are within the reach of the

process of the Court, they ought to be produced, or their absence accounted for;—particularly in cases where a resort to the private marks of the bank is necessary to afford satisfaction to the mind on trials for counterfeiting.

1839. PETTYWOOD v. COOKE, Cro. El. 52; PUTNAM v. COOKE, 3 Leon. 180. S. C.

Devise of three messuages to wife for life, remainder of one of them to A. and his heirs, of another to B. and his heirs, of another to C. and his heirs, and if any of them die without issue, the survivors to enjoy *totam illam partem* equally to be divided between them; and held that the survivors took only an estate for life.

Per Ld. C. J. Willes—"If I had been to give my opinion on that case, I own, (as I am at present advised) I should have thought otherwise." Vid. Moore v. Heaseman, Willes, 143.

1840. PHELPS v. BARRETT, 4 Price R. 23.

That case is at variance with Harris v. Hayward, 2 Marsh. R. 280; S. C. 6 Taunt. 569, and cannot be supported. Per Bailey, J. in Lewis v. Morland, 2 Barn. & Ald. 56.

1841. PHELPS v. DECKER, 10 Mass. R. 279; same dictum as in Fowler v. Shearer.

Denied in Rice v. Goddard, 14 Pick. 296.

1842. PHELPS et al. v. HARTWELL, 1 Mass. R. 72.

Doubted in S. C. (in note 2d ed.) But explained by Parker, C. J. in Brooks v. Barrett, 7 Pick. 98, 99.

1843. PHELPS v. SAGE, 2 Day, 151.

That the mortgagee has the whole legal estate in him; and may sustain ejectment even against the mortgagor after payment of the money.

Denied (in 4 Day 234,) Reeve, J.—"It is too late to say that mortgages, in the hands of the mortgagee, are real property. They are only considered in that point of light for the purpose of enabling the mortgagee to get into possession when he wants the benefit of his pledge. When contemplated in every other point of view, they are personal property. They will pass by a will not attested with three witnesses, because not real. They will not pass in a will by the term 'my real property,' and will pass by the terms 'all my personal property.' The wife of a deceased mortgagee cannot be endowed in mortgaged premises, because personal. When a woman becomes a *feme covert*, her mortgages are at the disposal of her husband, as much as any *chose* belonging to her; and a settlement upon her before marriage will operate upon her mortgages, just as it does upon all her other *choses*; so that at her death, they will belong to him, and on his death to his executor. Such an estate is not within the mischief of the statute of Conn. against selling pretended titles. The objection as to the mode of conveyance as—to wit, by deed cannot avail. It only amounts to this

that we have one species of personal property that must be conveyed by deed the same as real property. The mode of conveyance alters not the nature of the property. If, by law or usage, we were obliged to sell by deed a horse, that horse sold would not be real. The mortgagee who is satisfied has no claim to sell. He holds only the evidence of a legal title which he was bound to restore. He is then a mere trustee of the title for the mortgagor. He may and ought to restore it although it should eventually turn out that the mortgagor was not the real owner."

1844. PHENIX v. PRINDLE, Kirby's R. 209.

Ch. J. Ellsworth expressed an opinion, that the testimony of the plaintiff in book debts should be restrained to the quantity, quality, and delivery of the articles charged.

Denied in Bryan v. Jackson, 4 Conn. R. 288.—Hosmer, C. J.—As a general rule, when proper articles are charged on book, the parties, *quoad* the book debt, are admissible, like all other witnesses, to testify freely and fully, in support or confutation of the account.

1845. PHILLIPS v. EAMER, 1 Esp. R. 357.

S. P. as in Rex v. Brooke, (post).

1846. PHILLIPS v. FIELDING, 2 H. Bl. 123.

Doubted in Martin v. Smith, 6 East, 561.—Ld. Ellenborough—"It seems indeed to have been considered by the noble Judge, (Ld. Loughborough) whose opinions in the Duke of St. Albans v. Shore, 1 H. Bl. 270, and in Phillips v. Fielding, have been quoted, that it was necessary for the plaintiff to set forth the abstract of his title specially, but I am not convinced that this is necessary." In Ferry v. Williams, 8 Taunt. 66—Dallas, J. also said, "Phillips v. Fielding was in a degree doubted in Martin v. Smith :—Ld. Ellenborough there speaks of the rule in the former case as being the opinion of Ld. Loughborough only, and so speaks Lawrence, J."

1847. PHILLIPS v. GARTH, 3 Bro. C. C. 64.

Overruled in Elmsley v. Young, 2 My. & Ke. 780 ; (8 Cond. R. 227) : Held, that B. was the only surviving brother of A., and there were children of a deceased brother of A.—that the words "next of kin," used *simpliciter*, are to be taken to mean "nearest of kin," and that consequently B.'s personal representatives were entitled to the whole fund.

1848. 1 PHIL. EV., 108. (7 Lond. ed.)

Perhaps a confession by one prisoner when reduced into writing, if that part which relates to the other prisoners is capable of being separated; that part affecting the others may be omitted.

Overruled in Fletcher's case, 4 C. & P. 250;—Littledale. *Bartow's case*, Lewin, C. C. 110—Alderson. *Foster's case*, ib.—Denman, C. J. Sed

in *Bartow's case*, Parke, J.—"I know that is Mr. J. Littledale's opinion, but I do not like it."

1849. 1 PHIL. EV., p. 129, n. (a), (ed. 1823.)

The presumption arising from length of possession, in the case of incorporeal hereditaments "equally applies to lands and tenements."

Denied in Sumner v. Child, 2 Conn. 621. See also 1 Ph. Ev. note 311, p. 356, *et seq.* (ed. 1838.)

1850. 1 PHIL. EV., 255.

Leading questions are "such as instruct the witness how to answer, on material points."

Gresley's Eq. Ev. p. 47. "This is extremely vague."

1851. PHIL. EV., p. 292. (7 Lond. ed.)

A witness, to assist his memory, may use a written entry or memorandum, or the copy of a memorandum, and if he afterwards can swear positively to the truth of the facts there stated, such evidence will be sufficient.

Denied in The State v. Rawle, 2 Nott & M'C. 334, as not warranted by the cases cited.

1852. 1 PHIL. EV., 334.

Though all matters in difference are referred, the award is no bar of a cause of action not inquired into before the arbitrator.

Too unqualified. See Brophy v. Holmes, 2 Moll. 5.

1853. 1 PHILL. EV., 477, (7 Lond. ed.) Bull. N. P. 255; Gilb. Ev. 104.

If there is any blemish in the deed by rasure or interlineation, the deed ought to be proved, though above 30 years old.

Doubted in Bailey v. Taylor, 11 Conn. R. 535.

1854. 1 PHIL. EV., 531.—*Ambiguities.*

An *inaccuracy*, whether latent, or patent, may be explained by parol, subject to several restrictive rules, (2 Phil. Ev. p. 500, note (4) 7 Lond. ed.)

1855. 2 PHIL. EV., p. 203. S. P. Vol. 1. p. 338.

If a person indicted for an assault, plead guilty to the charge, the record has been considered to be conclusive against him in an action for damages for the same assault.

Oppo. 2 Phil. Ev. 203, note (3).

1856. 1 PHILLIPS ON INSURANCE, 44.

That the insurable interest of a consignee, or factor, is limited to the extent of his lien.

Denied in De Forest v. The Fulton Ins. Co., 1 Hall, 84.

1857. 1 PHIL. ON INS., 76; Marsh. p. 335.

An action will lie for the premium notwithstanding the formal acknowledgment of it in the policy, which is inserted there only to preclude the necessity of proving it in case of loss.

Denied in 1 Phil. Ev. 159. n. (5). Held to be conclusive as between the assured and the underwriter.

1858. *PHILIPS' CASE*, 3 Camp. 78.

Upon an indictment under the statute for an attempt to procure an abortion or miscarriage, Lawrence J. ruled that it was immaterial whether the woman was actually with child or not.

Overruled in *Scudder's Case*, 3 C. & P. 605.

1859. PHILLISKIRK v. PLUCKWELL, 2 M. & S. 396, n. (b).

A note given to a married woman; and she dies:—it was said to be doubtful, whether the right of action was in the husband, or in the administrator.

Settled in Griswold v. Penniman, 2 Conn. 566, that the husband can maintain an action in his own name and the property absolutely vests in him. But see Draper v. Jackson, 16 Mass. 480, where a note and mortgage made to husband and wife during the coverture, was held to survive to the wife.

1860. PHIPPS v. PARKER, 1 Campb. 412.

The subscribing witness to a deed having sworn that it was not executed in his presence, it was held that the deed could not be proved by evidence of the party's hand writing.

Contrary to Fassett v. Brown, Peake's Ca. 23; Grellier v. Neale, ib. 146; Fitzgerald v. Elsee, 2 Campb. 635; Abbot v. Plumbe, Doug. 216; Leman v. Dean, 2 Campb. 636, n.; Talbot v. Hodson, 7 Taunt. 251; S. C. 2 Marsh. 527; 1 Ph. Ev. 475.

1861. PHILPOT v. WALLET, 1 Freem. 541; 3 Lev. 65, S. C.

Overruled. Cork v. Baker, 1 Stra. 34; Harrison v. Cage, 1 Ld. Ray. 386.

1862. PICKERING v. LORD STAMFORD, 2 Ves. 279.

Doubted it seems in Byrne v. Frere, 2 Moll. 177.

1863. PIERCE v. CROFTS, 12 John. 90.

Held that the holder of a bill payable to A. B. or bearer, might either, as the bearer or indorsee thereof, recover on a count for money had and received.

Denied in Kennedy v. Carpenter, 2 Whart. R. 349, *et seq.*

1864. PIGOT'S CASE, 11 Co. R. 27; Markham v. Gomarton, Cro. Eliz. 626.

"When any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, erasing, or drawing a pen through a line, or through the midst of any material word, the deed thereby becomes void."

Doubted. See Nichols v. Johnson, 10 Conn. R. 197; Jackson d. Malin v. Malin, 15 J. R. 293; Rees v. Overbaugh, 6 Cowen, 746. See Master v. Miller, (ante).

1865. PIKE v. STREET, Moo. & Mal. 226; and see also Hall v. Wilcox, 1 Moo. & Rob. 58.

In an action by the indorsee against the indorser of a bill, a parol agreement to sue the acceptor only is admissible.

Explained in Foster v. Jolly, 1 Cr. M. & Ros. 703.—Parke, B.—"The effect of that case only is, that the defendant may deny the *prima facie* evidence of consideration."—"Pike v. Street, falls within the class of cases in which the consideration has been contradicted. There the agreement, that the plaintiff should sue the acceptor of the bill only, and should not sue the indorser, (the defendant). That, as between the plaintiff and the defendant, negatived any consideration, and so was admissible."

In Foster v. Jolly, supra, Held—that where a note is made payable 14 days after date, parol evidence cannot be given to shew that it was not to be paid, in case a verdict was obtained in an action brought between other parties.

1866. PILLANS & al. v. MIEROP & al., 3 Burr. 1670.

Where Wilmot J. holds that a *nudum pactum*, if evidenced by writing, is good, &c.

Skynner Ch. B. "observed upon the doctrine of *nudum pactum* delivered by Mr. Just. Wilmot, that he contradicted himself, and was also contradicted by Vinnius in his commentary on Justinian." Rann v. Hughes, 7 D. & E. 350, in note.

1867. PILFORD'S CASE, 10 Rep. 115 b.

Ld. C. J. Willes in Witham v. Hill, 2 Wils. 92, called this "an extraordinary case;" and it seems to be overruled in Jackson v. Calesworth, 1 D. & E. 71; Vid. Ward v. Snell, 1 H. Bl. 10.

1868. PILKINGTON'S CASE, 5 Rep. 76.

On the question whether after judgment for a return irreplevisable, a tender to the bailiff would entitle the party to an action against the principal for detaining the beast, Holt said "he was not satisfied with Pilkington's case in that point." 12 Mod. 354.

1869. PILKINGTON v. SHALLER, 2 Vern. 374.

"Certainly cannot be supported." Per Ld. Mansfield in Eaton v. Jaques, 2 Doug. 455.

1870. PINCOME v. RUDGE, Hob. 3.

That upon eviction of the freehold, no personal action of covenant will lie upon the warranty real.

The doctrine of this case is denied per Parsons, C. J. in Gore v. Brazier, 3 Mass. 544, 5, who cites 2 Brownl. 164, 165. *sed quære.*

1871. PINKNEY v. HALL, 1 Salk. 126, and 1 Ld. Raym. 175. The cases of Gregson v. Hutton, and Marsh v. Vansemmer, cited in 1 East, 49. The opinion of Le Blanc, J. in 1 East, 55, and of Ld. Eldon, in 6 Ves. Jun. 604.

One partner cannot pledge the partnership funds, nor make a valid partnership engagement for his individual debt.

Doubted by Kent, C. J. in 4 John. R. 277; "whether this doctrine can be supported, in cases where the person dealing with the partnership is not chargeable with knowledge of the fact, I am not prepared to say. I believe the English law is now understood to be otherwise."

1872. PINNEY v. GLEASON, 5 Cowen, 152.

Reversed in 5 Wend. 393; and affirming that the *measure of damages* in an action on a note for $79 50 payable in salt at 14*s.* per bush. is the sum specified in the note.

1873. PIPON v. PIPON, Ambler, 25.

S. P. as in Holmes v. Remsen, (ante).

1874. PISTOL v. RICCARDSON, 3 Dougl. 361.

S. P. as in Rose v. Bartlett, (post).

1875. PIT v. PELHAM, 1 Cha. Ca. 176.

'The inaccuracy of the early reports should be guarded against.' Sug. on Pow. p. 135, (No. 31, n. 1). Vid. Fowle v. Green, 1 Ch. Ca. 262.

1876. PITCHER v. JONES, Hardr. 217.

Overruled. Atto. Gen. v. Sheriff, Forrest. 43.

1877. PITT v. WILLIS, Dick. 24.

The answer of a defendant not brought to a hearing, was read against another at the hearing.

Doubted. Gres. Eq. Ev. 25.

1878. PLATT v. HIBBARD, 7 Cowen, 497.

The burden of proof is upon the bailee to show that the goods were not lost by his neglect.

Oppo. Marsh v. Horne, 5 B. & C. 322, and Harris v. Packwood, 3 Taunt. 267.

1879. PLESTORO v. ABRAHAM, 1 Paige Ch. R. 236.

Reversed 3 Wend. 538: and deciding that an assignee under a foreign commission of bankruptcy is not entitled before judgment to an *injunction* to restrain the bankrupt from receiving from the customs here, merchandise, which was on the high seas on board a vessel, when commission was sued out in the foreign country.

1880. PLOWDEN'S TR. ON USURY.

Ld. Kenyon said that 'this was the first English Law book that advocated dishonesty.' Law Mag. for 1832, (No. 17.)

1881. PLOWDEN'S REPORTS.

Ld. Coke says, (Pref. 10 R. 10)—'Plowden's Commentaries are curiously polished and published by himself; of high account with all the professors of the law.' However, he remarks—'they contain four erroneous cases, when the whole number of cases are but 43.'

1882. PLUMB v. WHITING, 5 Mass. 518; Skillinger v. Bolt, 1 Conn. 147; Richardson v. Hunt, 2 Mumf. 148; Trustees of Lansingburgh, 8 John. R. 428; M'Veauagh v. Goods, 1 Dall. 62; 2 Dall. 50.

That a witness will be incompetent merely on the ground of his believing himself interested.

Oppo. 1 Phill. Ev. 53. (7 Lond. ed.); Stimmel v. Underwood, 3 Gill. & J. 282; Long v. Baille, 4 S. & R. 222, and Fernsler v. Carlin, 3 ib. 130; Rogers v. Burton, Peck, 108; Doe v. Bragg, Ry. & Moo. N. P. Cas. 388; Moore v. Hitchcock, 4 Wend. 292; Smith v. Downs, 6 Conn. 365; Carman v. Foster, Ashm. 133.

1883. POCOCK v. BILLINGS, 2 Bing. 269.

C. J. Best seems to have countenanced the idea that the declarations of the payee of a promissory note were admissible when they were adverse to the interest of the party making them.

Denied in Warner et al. v. M'Gary, 4 Verm. R. 512—Williams, J. See also Barough v. White, 4 B. & C. 325.

1884. POLE v. FITZGERALD, Willes' R. 641.

C. J. Parsons said (4 Mass. 225,) that a better report of this case is in 5 Brown's Parl. Cases, 131.

1885. POLLEXFEN v. MOORE, 3 Atk. 272.

In 1 Bro. C. R. 424, Ld. Loughborough says this case is not correctly reported in Atkins; but in substance is right.

1886. POLLEXFEN'S REPORTS.

'The copies of Pollexfen are very incorrect, varying in the pages and dates, sometimes being printed in numerical letters, thus MD. CCII. In the pages there is a chasm and mistakes.' Bridg. L. B. 257.

In North's life of Guilford (1 Vol. p. 110,) it is said, 'Pollexfen, since the revolution published a book of reports, as they are called, consisting chiefly of his factious arguments."

1887. POOLE v. SHERGOLD, 2 Bro. C. C. 118; 1 Cox, 273.

Denied in Chambers v. Griffiths, 1 Esp. 150, by Ld. Kenyon. Sed see Chambers v. Griffiths, (ante) and Roots v. Dormer, 4 B. & Ad. 77, and Casamajor v. Strode, 8 Cond. Ch. R. 517, *et seq.*—"Best reported by Mr. Cox." Per Chan. in My. & K. 706.

1888. POPE v. BIGGS, 9 B. & C. 245—Bayley.

Doubted in Partington v. Woodcock, 5 Nev. & M. 672, where Patteson, J., adverting to the expressions of Bayley, J. says—"I never could understand how the notice of the mortgagee could make the lessee tenant to him, at the reserved rent."

In Doe d. Barney v. Adams, 2 Tyrwh. 289. (also Doe d. Barker v. Goldsmith, 2 ib. 710): Held, that a lease purporting to be by mortgagor and mortgagee jointly, operates as a lease by the mortgagee, with a confirmation by the mortgagor until the estate of the former has been determined by the payment of the mortgage-money, and then it becomes the lease of the mortgagor, and the confirmation of the mortgagee; and therefore, if ejectment be sued against the tenant during the mortgagee's estate, the demise should be laid in the name of the mortgagee; if afterwards, in that of the mortgagor.

If mortgagor sues for rent, accruing after notice to the tenant by the mortgagee; the tenant should plead *non assumpsit*, and will be allowed to give the mortgage and notice in evidence; but, where the rent becomes due *before* notice, but was unpaid at the time of the notice, the tenant must plead his defence specially. Waddelove v. Barnett, 4 D. P. C. 347.

1889. POPE v. FOSTER, 4 T. R. 590.

An averment in a declaration of the day of a former trial must exactly agree with the record to be produced in evidence to support it, though it be laid under a videlicit.

Overruled in Purcell v. Macnamara, 9 East, 157; 1 Stark. Ev. 492.

1890. POPE v. ONSLOW, 2 Vern. 286.

Where A. has two mortgages of different independent estates of the mortgagor, one a deficient security and the other more than sufficient; held that the mortgagor shall not redeem the last without making good the deficiency of the first.

Doubted by Ld. Hardwicke, who forbid the citing of this "imperfect case." 1 Atk. 300.

1891. POPE v. SANDERS, 12 Ves. 290.

Lord Erskine was clearly mistaken in Pope v. Sanders; Swanton v. Biggs, 2 Moll. Ch. R. 16.

1892. POPHAM v. BARSFIELD, 1 Salk. 236.

Incorrectly reported; Vid. Allanson v. Clitherores, 1 Ves. 24; 1 P. Wms. 54.

1893. POPHAM'S REPORTS.

The case of Brooks v. Brooks, Poph. 125, being cited, Holt said "the said part of Popham's Reports, being reported by an uncertain author, ought not to be regarded." 1 Ld. Raym. 626; Vid. 1 Keb. 676.

1894. POPKIN v. BUMSTEAD, 8 Mass. 491.

Explained in Eaton v. Simonds, 14 Pick. 107.

1895. PORDAGE v. COLE, 1 Saund. 319.

Defendant had agreed by specialty to give plaintiff £775 for certain lands; and the action was for non-payment, but no averment of a conveyance by plaintiff or a tender of one: and on demurrer held well, for that the covenants were independent.

Ld. Kenyon says of this case, and others of the same sort, "the determinations in them outrage common sense." Goodison v. Nunn, 4 D. & E. 761.

1896. POTTER v. STONE, 2 Hawks, 30.

Doubted in State v. Lipsey, 3 Dever. R. 485.—Daniel, J.

1897. POTTS v. LAZARUS, 2 Car. Law R. 83.

Doubted in Godley v. Taylor, 3 Dever. R. 178.—Hall, J.

1898. POVEY v. BROWN, Prec. Ch. 225.

Lord Alvanley calls this, in Like v. Beresford, 3 Ves. 512, a strange case; and says it is contradicted by two cases; one before Lord Hardwicke, Jemson v. Moulson, 2 Atk. 417, and the other before Lord Northington, Newman v. Mason, 1 P. Wms. 458, note 1.

1899. POWELL v. BROWN, Law Journal, No. 3, 442; 1 Bail. R. 100. S. C.

A remainder in chattels, by deed, is good.

Denied in Morrow v. Williams, 3 Dev. R. 263. See also Betty v. Moore, 1 Dana's R. 237.

1900. POWELL v. FORD, 2 Stark. R. 164—Ellenborough.

The witness to prove the signature of a party to a bill of exchange must have seen the party write the whole name which he was to prove.

Overruled in Lewis v. Sapio, 1 Moo. & M. 39, Abbott, C. J. 'I will not abide by any such decision as that.'

1901. POWELL v. MILLBANK, 2 Bl. R. 851.

Ld. Grey said the report (3 Wils. 355), was fuller and better.

1902. POWELL'S LESSEE v. GREEN, 2 Pet. R. 240.

Overruled in Green v. Lessee of Neal, 6 Pet. R. 291.

1903. POWELL ON POWERS.

'A kind of *terra incognita* from which I always returned with jaded spirits and roused indignation.' 4 K. C. 328.

1904. POWER v. WHITMORE, 4 M. & S. 141.

Wages and provisions during the detention in an intermediate port, for the preservation of the ship, &c. are not included in a general average loss in England.

Oppo. Thornton v. The United Ins. Co., 3 Fairf. R. 152: "the law has been differently settled in the American courts." Per Parris, J., in ib.

1905. PRACTICAL REGISTER IN CHANCERY.

—'Not a book of authority, but it is better collected than most of the kind.' Per Ld. Hardwicke, 2 Atk. 22.—'This and other books of practice only cited where no other authority occurred.' Redesdale's Pl. 7, (n).

1906. PRAED v. The DUCHESS OF CUMBERLAND, 4 T. R. 585.

Buller, J. said—"If there be an award in fact, the party cannot, on the trial of an issue of no award go into objections to the award, in point of law.

Overruled in Fisher v. Pimbley, 11 East, 187; Allen v. Watson, 16 John. R. 205. See Macomb v. Wilbur, ib. 227.

1907. PRECEDENTS IN CHANCERY.

'A book of no great repute.' Per Brougham, Ch. (in 1 R. & M.—Contra, 7 Lond. Law Mag. 377.)

1908. PRESCOTT v. FREEMAN, 4 Mass. R. 627.

S. P. as in Manton v. Hobbs, (ante).

1909. PRES., DIR. & CO. of MANHATTAN CO. v. OSGOOD, 1 Cowen, 65.

Reversed in Osgood v. Pres., Dir. & Co. of M. Co., 3 Cowen, 612: Held, that the admissions of executors cannot be given in evidence against heirs or devisees; and if such evidence be admitted, it is error.

1910. PRESTON v. CARR, 1 Yo. & Jer. 175.

Doubted in Bolton v. Corporation of Liverpool, 1 Coop. Sel. Ca. 19, (8 Cond. 360.)

1911. PRESTON v. CROFUT, 1 Conn. 527, note.

The absolute nullity of deeds fraudulent against creditors, even as against a *bona fide* purchaser, is maintained by a majority of the judges.

Denied in Somes v. Brewer, 2 Pick. 198.

1912. PRESTON'S CONVEY., 3 Vol. 27.

The opinion there as to merger of the equitable estate tail by accession of the legal fee, Ld. Chancellor dissents from, considering the legal estate as a mere shadow, incapable of effecting the slightest change in the true title. Brown v. Blake, 1 Moll. Ch. R. 382.

1913. PRICE v. THE EARL OF TORRINGTON, 1 Salk. 285; 2 Ld. Raym. 873, S. C.

Where the draymen came every night to the clerk of a brewer, and gave him an account of the beer delivered, which he set down in a book kept for that purpose, to which the draymen set their hands, and the drayman was dead, the book with his hand set to it, the handwriting being proved, was held good evidence of a delivery.

Doubted. See 2 Poth. 190; 1 Phil. Ev. 263, 4. But see Welsh v. Barrett, 15 Mass. 385.—Parker, C. J.—"It has never been overruled, nor have we ascertained that it is considered as a questionable case. It is stated as law in the most approved digests."

In Smith's L. Cas. p. 140, *et seq.* are the following observations:—"The books supply repeated instances in which the entries of a deceased person, contrary to his own interest, have been, after his death, received as evidence of the fact stated by him in those entries. But the decision in the principal case seems hardly to range itself within that class of authorities, for, as remarked by Mr. Phillipps, in his "Law of Evidence," such a declaration by a tradesman's servant as that made by the drayman in Price v. Lord Torrington, is clearly distinguishable from entries in the book of a receiver, who by making a gratuitous charge against himself, knowingly, against his own interest, and without any equivalent, repels every supposition of fraud. A disposition to commit fraud would have tempted him to suppress altogether the fact of his having received any thing, or to misre-

present the amount of the sum, but not to mis-state the ground or consideration upon which it was received; that is, not to mis-state the only fact sought to be established by the proposed evidence. On the other hand, the declaration of the tradesman's servant is given in evidence to prove the fact of delivery, and as he gives the account not against his own interest, which is some security for the truth of the statement in the other case, the probability of his account being true or false is neither greater nor less than the probability of his being honest or dishonest, which is nothing more than may be said in every case of hearsay. The circumstance of his thereby acknowledging the receipt of goods, which, it may be said, would be evidence in an action against him, seems to amount to little or nothing. It was the least he could say. To have said nothing at all would, as he must have known, necessarily lead to inquiry.

Price v. Lord Torrington falls within the class of cases thus described by Mr. Justice Taunton. "A minute in writing, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by the circumstances, which render it probable that the fact occurred, is admissible in evidence." Doe v. Turford, 3 B. & Ad. 898. In that case, a landlord instructed B. to give the defendant notice to quit, and B. communicated it to his partner P., who prepared three notices to quit, two of them to be served on other persons, and three duplicates, went out, returned in the evening, and delivered to B. three duplicates, one of which was a duplicate of the notice to the defendant indorsed by P. It was proved that the other notices were delivered as intended, that the defendant had afterwards requested not to be compelled to quit, and that it was the invariable practice of the clerks of B. and P., who usually served the notices to quit, to indorse, on a duplicate of such notice, a memorandum of the fact and time of service. The duplicate in question was so indorsed; and it was admitted, after the death of P., to prove the service of the third notice on the defendant.

The former cases on this subject will be found cited in Doe v. Turford, it will therefore be unnecessary to advert to them at length in this note. See Pitman v. Maddox, 2 Salk. 690; Hagedorn v. Reid, 3 Camp. 379; Champneys v. Peck, 1 Stark. 404; Pritt v. Fairclough, 3 Camp. 305, et notis. In Poole v. Dicas, 1 Bingh. N. C. 649, a bill became due and was left with a notary to demand payment, M. the notary's clerk went out, returned, and in one of the notary's books into which the bill had been previously copied, wrote in the margin no effects, another clerk made a similar entry in another book from M.'s dictation, all this was done in the regular course of business, the court held that after the death of M. the entry made by him was admissible to prove the dishonor of the bill. "We think it," said Tindal, C. J. "admissible, on the ground that it was an entry made at the time of the transaction, and made, in the usual course and routine of business, by a person who had no interest to mis-state what had occurred."

Mr. J. Parke, in delivering his judgment in Doe v. Turford, remarks a distinction between the admissibility of an entry of this description, and of an entry admitted in evidence because against the interest of the party making it. "It is to be observed," said his Lordship, "that in case of an entry falling under the rule as being an admission against interest, proof of the handwriting of the party, and his death is enough to authorize its reception: at whatever time it was made, it is admissible. But in the other case it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry." 3 B. & Ad. 898.

Whatever effect may be due to an entry made in the course of any office, reporting facts necessary to the performance of a duty, the statement of

other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances.' Per Denman, C. J. in Chambers v. Bernasconi, 1 Tyrwh. 342; 4 ib. 531, in Err. This decision turned on the circumstance that the officer had gone beyond the sphere of his duty in making an entry of the *place* of arrest. See Poole v. Dicas, 1 Bing. N. C. 649, where the authority of Doe v. Turford, (*supra*) was recognized. See Merrill v. Ithaca & O. R. R. Co. 16 Wend. 586.

1914. PRICHARD v. QUINCHANT, Ambl. 147.

This case, as reported by Ambler, is said to be a very loose and incorrect note. It is more accurately stated by Ld. Redesdale in 1 Sch. & Lefr. 296.

1915. PRIDDLE'S CASE, Leach's Crown Law, 382.

That a witness may be asked whether he has not been sentenced to Newgate.

Overruled in Rex v. Careinion, 8 East, 77. Vid. Rex v. Edwards, post.

1916. PRIDEAUX v. MORRIS, 1 Lutw. 82; 2 Salk. 502.

That for false return of member of Parliament, no action lies vs. the sheriff.

Willes, C. J. said "he should always set his face against this case." Wynne v. Middleton, Willes, 605, 606; 1 Wils. 125.

1917. PRINCE v. SHUTE, Molloy, b. 2, ch. 10. sec. 1 Wils. 28.

Said to be mistaken, or not law, in Masters v. Miller, 4 D. & E. 336, and Paton v. Winter, 1 Taunt. 420.

1918. PRINCESS of WALES v. The Earl of LIVERPOOL, 1 Swans. R. 114; 2 Wils. Ch. R. 29, S. C.

Ld. Eldon dismissed the bill in Chancery because the note stated in bill was not produced.

Denied in Penfield v. Nunn, 5 Sim. R. 409, and in Kelly v. Eckford, 5 Paige Ch. R. 549, and the cases there cited.

1919. PRING v. CLARKSON, 1 Barn. & Cress. 14.

"In no case has it been said, that taking a collateral security from the acceptor shall have that effect;" that is, of discharging the other parties to the bill; and Ch. J. Abbott concludes by saying, "here the second bill was nothing more than a collateral security."

Denied in Okie v. Spencer, 2 Whart. R. 253. 258, *et seq.*

1920. PRINN v. EDWARDS, 1 Ld. Raym. 47.

S. P. as in Rogers v. Mayhoe, (post).

1921. PRIOR v. POWERS, 1 Keb. 811.

That a juror should not be received to testify that the verdict was the result of chance.

Spencer J. called this "a very unintelligible and illy reported case," in Smith v. Cheetham, 3 Caines, 57, where such evidence was held admissible.

1922. PROCTOR v. BENY, Barnes' R. 450.

Denied in Patton v. Trueman, Coxe's N. J. R. 113.

1923. THE PUBLIC ADM. v. WATTS, 1 Paige's Ch. R. 168.

Reversed in Watts v. Public Adm., 4 Wend. 168.

1924. PURCELL v. MACNAMARA, 9 East, 157.

Ld. Ellenborough intimated an opinion, that an averment "as appears by the record" is to be considered as descriptive of the record, and conclusive.

Denied in Stoddart v. Palmer, 3 B. & C. 2.

1925. PURDON v. JACKSON, 1 Russel, 1.

S. P. as in Hornsby v. Lee, (ante).

1926. PURLING v. PARKHURST, 2 Taunt. 237.

That if the memorial of an annuity recites a bond, binding the obligor and his heirs, as a bond binding the obligor only, it is not cured by reciting the condition to be for payment by the heirs of the obligor.

Denied in Horwood v. Underhill, 4 Taunt. 346.

1927. PYBUS v. MITFORD, Freem. R. 372.

S. P. as in Gilpin's case, (ante).

1928. PYLUS v. SMITH, 3 Bro. Ch. Ca. 346.

Overruled. Vid. Newman v. Cartony, and Ellis v. Atkinson, ante, the like point. Lord Strange v. Smith, Amb.; Socket v. Wray, 4 Bro. —; Mores v. Huish, 5 Ves. —; Harvey v. Blakeman, 9 Ves. —; Francis v. Wizzle, 1 Madd. R. 6; Morgan v. Elam, 4 Yerg. R. 375, and *cases cited.* The last case decides, that the power of the *feme covert* is limited by the deed creating the estate; and does not extend beyond it.

1929. QUEEN v. GODDARD, 2 Ld. Raym. 922.

Doubted in Chit. Cr. Law, 461, note, and by Gibson, C. J. in 3 Penn. R. 363;—"No adjudged case supports the dictum of Lord Holt in the Queen v. Goddard, that a defendant can plead over but in treason or felony," &c.

1930. THE QUEEN'S CASE, 2 Brod. & Bing. 299.

The principle, that it was necessary to remind the witness of the conversation before you can contradict him by showing he has at some other time made a contradictory statement; and the question there put to the judges assumed that the witness had not been at all interrogated with respect to the declaration supposed to have been made by him.

New rule in Angus v. Smith, 1 Mo. & M. 473—Tindal:—"Before you can contradict a witness by showing that he has at some other time said something inconsistent with his present evidence, you must ask him as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, but particulars must be specified by him."

1931. QUEEN'S CASE, 2 B. & B. 300; 3 Stark. Ev. 1753.

"Whenever the credit of a witness is to be impeached by proof of any thing he has said or done in relation to the cause, he is first to be asked, upon his cross-examination, whether he has said, declared, or done that which is intended to be proved."

Denied in Tucker v. Welsh, 17 Mass. 160; Ware v. Ware, 8 Greenl. R. 53—Mellen, C. J.: "This principle has not been admitted in Massachusetts; nor has it in practice in this state."

1932. QUINTIN, EX PARTE, 3 Ves. Jr. 248.

Disapproved by Ld. Eldon in Ex parte Twogood, 11 Ves. 517. 519, and by the Master of the Rolls in Addis v. Knight, 2 Merivale, 117.

1933. RABB v. AIKEN, 2 M'Cord Ch. 118.

Reviewed and limited in Black v. Steel, 1 Bail. R. 307.

1934. RABORG v. PEYTON, 2 Wheat. R. 385.

"Every subsequent holder, in respect to the acceptor of a bill, and the maker of a note, stands in the same predicament as the payee. An acceptance is as much evidence of money had and received by the acceptor to the use of such holder, and of money paid by such holder for the use of the acceptor, as if he were the payee." Held, that debt might be maintained by the endorsee, against the acceptor of a bill of exchange, it being expressed to be for value received.

Denied in Kennedy v. Carpenter, 2 Whart. R. 354, *et seq.* See also Pierce v. Crofts, 12 John. R. 90.

1935. RACKSTRAW v. IMBER, Holt's N. P. R. 268.

Doubted in Fromont v. Coupland, 2 Bing. 366, where Best, C. J. says, 'it is only a *nisi prius* decision, and might, upon further consideration, have been determined otherwise.' See also the observation of Park, J. in S. C.

[illegible]DCLIFFE [illegible]N, 2 [illegible] 414.

[illegible] of L[illegible] [illegible] a party [illegible] a [illegible] which [illegible] his profe[illegible] adviser, but not the opinion which he ha[illegible]

[illegible] in Gres. Eq. [illegible] and cases cited. See also, 1 [illegible] Ca. [illegible]

[illegible] 1 Keb. 7[illegible]

[illegible] v. [illegible]e, 1 Taunt. 55.

[illegible]. RANDAL[illegible] v. [illegible]E, 2 Mod. R. 308.

[illegible] court [illegible] reported to have given as a special reason for their decision, that the judgment therein pleaded was not only erroneous but [illegible], on account of its having been given after the death of the defendant.

[illegible] Tainter, 4 Watts' R. 279, 280.—Kennedy, J. who seemed to [illegible], that the reporter had misstated the reason assigned for [illegible]

[illegible] [illegible]GHES, 7 T. R. 350.

Ruffin, J. in 2 Murph. R. 333, says—"The note of the case in Term Reports, seems to be a confused one; but its accuracy in this respect (the want of assets not being alleged) is evinced by what fell from Lord Mansfield in Hawkins & Wife v. Saunders, Cowp. 291.

1940. RASTALL'S ENTRIES.

Ld. [illegible]borough, (in King v. Wildy, 1 M. & S. 189), said, that one of the forms under title Gaol Delivery was one of the most vicious precedents he ever contemplated.

1941. RATCLIFFE v. [illegible], 3 Bos. & Pul. 223.

That an officer m[illegible] and admittance, before he can legally break open an inner door, &c.

Overruled in Hutchinson v. Birch, 4 Taunt. 619. 612.

1942. RATC[illegible], Yelv. 178: S. C. Noy, 137; 1 Bulstr. 29; Cro. Jac. [illegible]

Dictum—[illegible] if pawner do not redeem during his life, the right of redemption d[illegible] not descend to his executor. Same point, 1 Ld. Raym. 434.

Denied in Cortelyou v. [illegible], 2 Caines' Ca. in Error, 202.

1943. [illegible]PLE v. POPHAM, 2 Str. 992.

[illegible] the execution of a power might be good in equity and yet void

But the contrary is holden in Zouch v. Woolston, 2 Burr. [illegible].

This last decision, however, seems to be questioned by L. Redesdale, 1 Sch. & Lefr. 70.

1944. RAWLIN'S CASE, 4 Co.—ASCOUGH'S CASE, 9 Co. [illegible].

It is held, that the whole rent is *suspended*, where part [illegible] to the lessor.

Denied Hodkins v. Robey, 1 Vent. 273.—'The [illegible] point was not necessary to the judgment given in that case, [illegible] as upon the extinguishment of the condition, which is entire, and not to be apportioned. But as to the rent no book was found to warrant such an opinion, but Brooke, Tit. Extinguishment, 48,' [illegible] Com. Land. & Ten. 218. acc.: 3 K. C. 470.

1945. RAY v. FENWICK, 3 Bro. Ch. R. 25.

Story, J., in Trecothick v. Austin, 4 Mason [illegible], the report "is certainly very unsatisfactory."

1946. RAYMAN v. GOLD, Moor, 635.

Devise by implication, &c. Mr. Justice Wilm[illegible] this case in Bendale v. Summerset, 5 Burr. 2609.

1947. RAYMOND'S (LORD) REPORTS, Vol. 1.

"These notes were taken in 10 W. 3, when Lord Raymond was young, as short hints for his own use; that they are too incorrect and inaccurate to be relied on as authorities." Per Ld. Mansfield in Burr. 36; Vid. also 3 D. & E. 261.—But Chan. Kent (4 K. C. [illegible] says, 'that these reports are valuable for the many useful entries and forms of pleading which accompany the cases.'

1948. RAYNER v. DOWDY, 1 Murphy, 279.

Doubted in Pipkin v. Wyans, 2 Dev. [illegible].

1949. REA v. MEGGOTT, cited in Cas. Temp. Hardw. 77.

That a parol acceptance of an inland bill of exchange was not binding.

Overruled in Lumley v. Palmer, 2 Str. [illegible]; also Windle v. Andrews, 2 B. & Ald. 699.

1950. READ v. ADAMS, 6 S. & R. 356.

In an action on a foreign bill of exchange; held, that the indorsee need not prove that the indorser had notice of the non-acceptance of the bill.

Oppo. Watson v. Loring, 3 Mass. 557; Thompson v. Cummings, 2 Leigh's R. 321; Bacheller v. Priest, 12 Wend. 399; Phenix Bank v. Hussey, ib. 483; 2 Phil. Ev. 31 et seq and notes.

1952. [illegible] v. GARNETT, [illegible]

Borrowdale v. Hitchener, 3 B. & P. 245, per Rooke, J. [illegible] reason upon which the decision in Read v. Garnett is [illegible] proves it to be a case of no authority; for a demand of the money is there said to be necessary before execution is taken out, (in case of a verdict upon a wager) as it would be in moving for an attachment. And Heath, J. added: "Many of the cases reported in [illegible] are not law."

1953. [illegible] v. LEE, 2 B. & Ad. 415.

Accepts of summonses at judges chambers are not allowed by K. B. Oppo. Doe d. Prescott v. Roe, 9 Bing. 104.

1954. READ v. [illegible], 1 Cr. M. & Ros. 302.

Held, that in debt on judgment for the plaintiff in an inferior court, the declaration must allege that the original suit arose within the jurisdiction of the inferior court. (Overruling Bentley v. Donnelly, 8 T. R. 148, Isaacs v. Cesar, 2 Wms. Saund. 101 n. (2). n. (b).)

1954. READ v. SNELL, 2 Atk. 642.

Overruled in Garth v. Baldwin, 2 Ves. 646; Lyon v. Mitchell, 1 Madd. Ch. [illegible] 486.

1955. RECTOR OF CHEDINGTON'S CASE, 1 Rep. 153.

Demise to B. for 10 years after the death of C. if C. dies within ten years. Held that if C. survive the 10 years, the term shall never take effect.

Denied in Wright v. Cartwright, 1 Burr. 282.

1956. READE v. LIVINGSTON, 3 J. Ch. R. 481.

A voluntary settlement by a person who is indebted, is void as to existing creditors, [illegible] regarding the amount of the debts or the circumstances of the party.

Doubted. See Story's Eq. Jurisp. 343, 360; also, 2 K. C. 442, n. (a).

1957. READE v. BLOOM, 10 J. B. Moore, 261; 3 Bing. 9.

A plaintiff obtaining a verdict against defendant is entitled to his full costs, although the person who conducted the cause is not an attorney. Limited by Meekin v. Whalley, 4 Moore & Scott, 499 n. (i) and Humphreys v. Harvey, 4 ib. 500, to cases where no advances of money appear to have been made by the client to the supposed attorney on account of the suit.

1958. REDESDALE, PLEAD. 9.

"The plaintiff may require a discovery of the case on which the defendant relies, *and of the manner in which* he intends to support it."

Denied by Wigram on Points in the Law of Discovery 171, [illegible], (Am. ed.) who says, the latter part of the above quotation, must be an inaccuracy; it is opposed to all the authorities.

1959. REDSHAW v. HERTHER, Carth. 354.

Denied in 2 Phill. Ev. p. 155, 6. (7 Lond. ed.) . "The [illegible] only a mistake, in the short note of this case, as to the [illegible] the [illegible]."

1960. REED v. WHITE, 5 Esp. R. 122.

Doubted by Parke, J. in 4 M. & Ry. 359, as to the accuracy of the report of that case.

1961. REES v. SMITH, 2 Stark. R. 31; 1 Arch. C. P. 169.

Overruled in William v. Davies, 1 Cr. & M. [illegible] Brown v. Murphy, R. & M. 254; Sylvester v. Hall, ib. 255.

1962. REGINA v. BARKIN, 2 Ld. Raym. 1520.

"A strange note"—Per Ld. Mansfield, 5 Burr. 2686. Vid. also, Cowp. 329.

1963. REGINA v. DANIEL, 6 Mod. 100.

Dictum of Holt, C. J. Denied in Rex v. Higgins, 2 East, 17.

1964. REGINA v. DARBY, 1 Salk. 78.

That judgment *quod capiatur pro fine* is a final judgment.
Denied in Rex v. Robinson, 2 Burr. 801.

1965. REGINA v. MURRAY, 1 Salk. 122.

Overruled. Rex v. Luffe, 8 East, 193; Rex v. Bedell, Ca. temp. Hardw. 379; Andrews, 9. S. C.; Pendell v. Pendell, 2 Str. 925.

1966. REGINA v. TAYLOR, 2 Ld. Raym. 767, 2

Overruled in Rex v. Strong, 1 Burr. 251. Vide Regina v. Franklyn, 2 Ld. Raym. 1522.

1967. REID v. VANDERHEYDEN, 1 Hopk. 408.

Reversed in 5 Cowen, 719.

1968. REILLEY v. JONES, 8 Moore, 224; 1 Bing. 302.

Overruled in Davies v. Penton, 6 B. & C. 216; Kemble v. Farren, 6 Bing. 141; (Chit. jr. on Cont. 336.)

1969. REMINGTON v. STEVENS, 2 Str. 1271.

S. P. as in Bull. N. P. 180. (ante).

1970. RENNELL v. LINCOLN, 3 Bing. 223; 11 Moore, 139.

Reversed in Mirehouse v. Rennell, 8 Bing. 490; 1 M. & Scott, 683; affirming S. C. (in error) nom. Rennell v. Lincoln, (Bishop) 7 B. & C. 113; 9 D. & R. 810.

1971. 12 REP. (12 Co.)

Parke, J. in 10 B. & C. 263, said:—"The 12 Rep. is not a book of any great authority. It is said by Mr. Hargrave, 11 St. Tr. 30, to be of small authority, being not only posthumous, but apparently nothing more than a collection from papers neither digested nor intended for the press by the writer. And Mr. Sergeant Hill, in his copy, refers to fo. 18, 19, as showing that the 12 Rep. was not fit to be allowed. And Holroyd, J. in Lewis v. Walter, 4 B. & A. 614, gives an opinion unfavorable to its accuracy."

1972. REPORTS.

"It is objected that these books are of no authority; but if both the reporters were the worst that ever reported, if substantially they report a case in the same way, it is demonstrative of the truth of what they report, or they could not agree." Ld. Mansfield in R. v. George, Cowp. 16.

1973. REPORTS OF CASES IN CHANCERY—cited as Rep. Temp. Finch.

No authority. Ld. Hardwicke, 3 Atk. 384; 1 Wils. 162.

1974. RESPUBLICA v. GARMALT, 4 Yeates, 416.

Overruled in S. C. 2 Binn. 235.

1975. REX v. ADERLY, Dougl. 463; Castle v. Burdett, 3 T. R. 623; Glassington v. Rawlins, 3 East, 407.

When the computation of time is to be made from an act done, the day on which the act is done, is to be included.

Denied in Ex parte Dean, 2 Cowen, 605; where the court say:—"We have departed from the rule of construction of the English Courts, and hold that the same mode of computation is to be adopted upon statutes which prevail both in England and in this country as to notices; that is to say, one day is to be counted inclusive, and the other exclusive." See Presbrey v. Williams, 15 Mass. 193.

1976. REX v. ADY, 7 C. & P. 140.

If a party obtain money by a false pretence, it is no answer to show that the party from whom he obtained the money laid a plan to entrap him into the commission of the offence.

Doubted.

1977. REX v. ALLEN, Sir T. Raym. 197; Per Twisden, J. and Prec. Ch. 50.

Quære, if not overruled in 2 Vern. 42. 78. 145; Walker v. Perry, Hawk. P. C. c. 82. sec. 10; Ord on Usury, 35.

1978. REX v. ALL SAINTS, WORCESTER, 1 Phil. Ev. 79.

Overruled. See Rex v. Barbee, Chelmford Assizes, cited in Chit. on B. 653, 8th Am. ed., n. (t).

1979. REX v. BARB, 3 D. & E. 579.

Same point as in Lynn, Mayor of, v. Denton, ante. Overruled in Mayor of Southampton v. Graves, 8 D. & E. 590.

1980. REX v. BEEZLEY, 4 Car. & P. 220.

The court will, on request, order a witness called and sworn, if his name is endorsed on indictment.

Rex v. Bodle, 6 Car. & P. 186, it is matter of *discretion* with the judge: but if called by defendant, he shall not call witnesses to contradict him.—Gazelee & Vaughan.

1981. REX v. BENNETT, 1 Str. 101.

That a new trial is not grantable in an information in nature of a quo warranto.

But ruled contra in Rex v. Francis, 2 D. & E. 484.

1982. REX v. BIGNOLD, 1 D. & Ry. N. P. C. 59.

If defendant's counsel state facts which he expects to prove, but afterwards declines to call witnesses, the plaintiff's counsel is entitled to reply.

Denied in Cremer v. Sodo, 1 Moo. & M. 84. Ld. Tenterden held, that the allowing a reply was discretionary on the part of the judge.

1983. REX v. BISHOP OF CHESTER & al., 2 Salk. 509.

Reversed in Dom. Proc. Show. Parl. Ca. 242.

1984. REX v. BLACKMAN, 1 Esp. 96—Kenyon.

Though the stat. 17 Geo. 2. c. 40, leaves an option in the judge either to inflict corporal punishment, or impose a fine, the expectation of a share in the fine shall render a witness incompetent.

Overruled in Rex v. Cole, 1 Esp. 169—Kenyon. And see Rex v. Bland, 5 T. R. 370.

1985. REX v. BROOKE, 2 Stark. R. 473; 1 Phil. Ev. 274.

If a witness is sworn, and would be competent to give evidence for the party calling him, the other party will in strictness be entitled to cross-examine him, though he has not been examined in chief.

Denied in Ellmaker v. Buckley, 16 S. & R. 77—Gibson, C. J. Where a person, called to produce a document, was sworn by mistake, and asked a question which he did not answer, it was held that the opposite party was entitled to cross examine him. Bush v. Smith, 1 Crom. M. & R. 94.

1986. REX v. BUGGS, Skin. R. 428.

It was held, that giving a penalty to the king, made a public statute. Rex v. Morgan, 2 Str. 1066; S. P. State v. Cobb, 1 Dev. & B. 115. Held, that an act, making it an indictable offence to fell timber in the channel of a particular creek, in a particular county, is a public law, and need not be recited in an indictment on it. The Court and jury are bound to take notice of it, without proof. But see Brett v. Beales, 1 M. & M. 416. A canal act giving power to levy toll on such as shall use the canal is not a public act; and a private act is not made admissible in evidence against strangers by a clause declaring "that it shall be deemed a public act and shall be judicially taken notice of without being pleaded;"—such a clause only applies to the forms of pleading.

1987. REX v. BURBACH, 1 M. & S. 370.

Overruled in Rex v. Crediton, 2 B. & Ald. 493; The King v. Inhab. of Newtown, 3 Nev. & M. 306.

1988. REX v. CADMAN, R. & M. C. C. R. 114.

That in a prosecution with respect to poisoning, it was held not to be essential to show the swallowing of the poison; but only that some of it was applied to the person to whom it was administered.

Denied by Park, J. in 4 C. & P. 369, who says—'My note differs from that report; and so also do my own feelings. I am inclined to think that some mistake has crept into that report; my recollection is that the judges held just the contrary to what is there stated.'

1989. REX v. CATOR, 4 Esp. R. 145.

S. P. as in Goodtitle d. Revett v. Braham, (ante).

1990. REX v. CLENDON, 2 Str. 870; 2 Ld. Raym. 1572.

Indictment for an assault upon *two*; and held not good.

This case was treated "as a case not well considered"—and was held not to be law. Rex v. Benfield & al., 2 Burr. 984.

1991. REX v. CLIVIGER, 2 T. R. 263.

Doubted, Rex v. Inhab. of Bathwick, 2 B. & Adol. 639: Ld. Tenterden, C. J. said—"The decision of Rex v. The Inhabitants of Cliviger appears to have been founded on a supposed legal maxim of policy, viz. that a wife cannot be a witness to give testimony in any degree to

criminate her husband. This will undoubtedly be true in the case of a direct charge and proceeding against him for any offence." But where the proceeding is *res inter alios acta*, as in a question of settlement, held, that the wife was competent to prove the first marriage, although her husband had been before examined, and proved the second marriage. Ib. See also 6 M. & S. 194; 1 Phil. Ev. p. 79, note 144. p. 148.

1992. REX v. COLE, 1 Mood. C. C. 11.

Overruled in Rex v. Solomons, 1 Mood. C. C. 292.

1993. REX v. MOOR CRITCHELL, 8 East, 66.

Doubted so strongly by the Court, that it may be considered as overruled by The King v. St. Mary's, Leicester, 1 Barn. & Ald. 463.

1994. REX v. DALTON, 2 Str. 911, and Rex v. Magarth, ib. 1242.

Doubted by Mr. J. Woodworth, in Ex parte Tayloe, 5 Cow. 59, who says, 'We are fortified in the belief that there was probably an omission to state the circumstances, by what Mr. J. Foster says in his Cr. Law, 294, of another case as reported by Strange. He complains that Strange was studious of brevity, and instances Rex v. Tranter, 1 Str. 499, which, from the facts reported, seems to be a case of murder; but by a report of the same case in 6 St. Tr. 195, it appears that important circumstances were omitted by Strange.'

1995. REX v. EDWARDS, 4 D. & E. 440.

That a witness may be asked if he has not stood in the pillory for perjury, because the answer subjects him to no punishment.

Contrary to Cooke's case, 1 Salk. 153, where the reason is, that no man shall be compelled to disclose his own shame: And is overruled in Rex v. Castell Careinion, 8 East, 77, on the ground that the *record* is the *only* evidence of the conviction. Same law in N. York, People v. Herrick, 13 Johns. 82, for the reason given in Cooke's case. Vid. Macbride v. Macbride, 4 Esp. Rep. 242.

1996. REX v. ELDERSHAW, 3 Car. & P. 396.

A boy under the age of fourteen, cannot be convicted of an assault with intent to commit a rape.

Denied in Commonwealth v. Green, 2 Pick. 380—Parker, C. J. dissenting.

1997. REX v. ELWELL, 2 Ld. Raym. 1514; (3 Ld. Raym. 999.)

Doubted and perhaps overruled in The King v. Wilson, 8 Ad. & El. 817:—Patteson, J.—"I did not mean to say, in Rex v. Oakley, 4 B. & Ad. 314, that the precedent in Rex v. Elwell, was good." See also

the observations of Denman, C. J. in delivering the judgment of the court.

1998. REX v. ERISWELL, 3 D. & E. 707.

Two justices examined a pauper under oath as to his settlement, but did not remove him. Afterwards he became insane, and was removed by the other justices upon the former examination, which was held to be admissible evidence.

But this is overruled in Rex v. Ferrystone, 2 East, 54, and Rex v. Abergwilly, ib. 63.

1999. REX v. FAGG, 4 Car. & P. 566.

Garrow, B. expressed his opinion, that nothing which a prisoner stated before he knew what the evidence against him was, ought to be used to criminate him.

Denied in Rex v. Bell, 5 Car. & P. 165:—Gaselee, J. after consulting Ld. Tenterden, C. J. said—My Lord Tenterden agrees with me that the opinion of Mr. B. Garrow in Rex v. Fagg is much too general, as it goes to exclude any acknowledgment of guilt made by a prisoner to a constable.

2000. REX v. GOSPER AND SHIRE, Yelv. 58.

That when a man assigns error in fact, he ought to put himself *en pais*.

Denied, for that the assignment ought to conclude with a verification. Sheepshanks v. Lucas, 1 Burr. 410.

2001. REX v. GREEN, 10 Mod. 212; Rex v. Adderley, Dougl. 465; Clark v. Davey, 4 Moore, 465.

The day on which the injury was committed must be *included* in the calculation of time.

Overruled in Hardy v. Ryle, 9 B. & C. 603, and Pellew v. Monford, ib. 134; and held, that that day is to be *excluded*; and also exclusive of the day of serving the notice. See 4 Mann. & Ryl. 300, in notes.

2002. REX v. HODGSON, R. & R. C. C. R. 21.

On indictment for a rape, the prosecutrix is not compellable to answer whether she has not had connection with other men.

Denied in Rex v. Martin, 6 Car. & P. 562.

2003. REX v. HOLLISTER, et REX v. FOLLY, 1 Bott's Poor-law, 78.

Overruled in Rex v. Gordon, 1 Barn. & Ald. 524.

2004. REX v. INHABITANTS OF HORNSEY, Carth. 212.

Carthew makes *Holt*, C. J. to say that where a Justice of the peace

presents a highway upon his view to be out of repair, the parties are estopped to plead that it is in repair.

But this is contradicted in Rex v. Wiltshire, 3 Burr. 1530. See other reports of Holt's opinion, 4 Mod. 38; Holt, 338; 12 Mod. 13; 1 Show. 270. 291.

2005. REX v. HUGGINS, 2 Com. 422.

In an action for escape, for the King's debt, Comyn says the defendant was allowed to plead *non debet* and fresh pursuit.

But in Parker, 15, it is said that the rule to shew cause why these pleas should not be pleaded was discharged. Vid. also Forrest. 61; Bunb. 96.

2006. REX v. JAMES, Carthew, 220.

Denied in Crook v. Dowling, 3 Doug. 76, 77, by Ld. Mansfield, and Mr. J. Buller; yet, Mr. Roscoe in note to S. C. p. 78, says—"As stated in Carthew, there was no evidence to connect the defendant with the affidavits; but in the report in 1 Shower, 397," S. C. there was. The case was recognized by Hullock, B. in Rees v. Bowen, 4 M. & Y. 383.

2007. REX v. JARVIS, 1 Burr. 188.

Better reported in 1 East, 647, from the MSS. of Ld. Ashburton, per Dennison, J. See 2 Dowl. Pr. R. 177, n. (a).

2008. REX v. LAFONE, 5 Esp. R.; S. C. 1 Phill. Ev. 74, (7 Lond. ed.)

On a joint indictment against several for a misdemeanor, a defendant, who suffers judgment by default, cannot be a witness for the other defendants.

Doubted in Commonwealth v. Marsh, 10 Pick. 58; The People v. Bill, 10 John. R. 95; Campbell v. The Commonwealth, 2 Virg. Cas. 314.

2009. REX ET REGINA v. LARWOOD, 4 Mod. 270; 1 Ld. Raym. 29; Skin. 574; Carth. 306; 1 Salk. 168. S. C.

Overruled. Evans v. Harrison, Wilm. 161; 6 Bro. P. C. 181, S. C.

2010. REX v. LLOYD, 1 Camp. 260.

Ld. Ellenborough appears to have been of opinion, that it was not necessary that a way should be a thoroughfare to presume a dedication.

Doubted in Wood v. Veal, 5 B. & A. 454; Jarvis v. Dean, 3 Bing. 447. See Marquis of Stafford v. Coyney, 7 B. & C. 257.

2011. REX v. LYONS, 1 Leach, C. C. 185; 2 East P. C. 497.

A house under repair, but not inhabited, is not the dwelling house of

the owner, though part of his property is deposited therein. Differently reported in Rex v. Fuller, 1 Leach C. C. 186, n.

2012. REX v. MADDERN, 1 T. R. 627.

Overruled in Rex v. Brooke, 9 B. & C. 915; 4 M. & R. 719.

2013. REX v. MEGGOTT, Cas. temp. Hardw. 77.

Overruled in Lumley v. Palmer, 2 Str. 1000; and Windle v. Andrews, 2 Barn. & Ald. 696.

2014. REX v. MERCERON, 2 Stark. R. 366.

Doubted by Ld. Tenterden in Rex v. Gilham, Ry. & Mo. Cr. Cas. 203.

2015. REX v. MIDDLEZOY, 2 T. R. 41.

Overruled in Gordon v. Secretan, 8 East, 548. See Johnson v. Lewellin, and Gordon v. Secretan, (ante).

2016. REX v. PEDLEY, 1 Leach C. C. 365.

Overruled and exploded. Ld. Eldon in Ex parte Oliver, 2 Ves. & Beam. 244.

2017. REX v. PENRYN, 5 M. & S. 443.

Overruled in Rex v. Penryn, 1 Nev. & M. 74; 4 B. & Adol. 224.

2018. REX v. PIERSON, 2 Ld. Raym. 1197.

It seems to be held, that keeping a bawdy house is an offence personal to the occupant of the house: and cannot affect the lessor.

Oppo. in Commonwealth v. Harrington, 3 Pick. 26: "The common law, *propria vigore*, will punish in a case like the one before us." (Indictment for letting a house to a woman of ill fame.)

2019. REX v. POOLE, 7 Mod. 195; Cases Temp. Hardw. 20.

Ld. Hardwicke seems to have been of opinion that where the law directs that officers of a corporation be elected annually, the corporation cannot elect after the expiration of the time.

Doubted in The Trustees of Vernon Society v. Hills, 6 Cow. R. 23; The People v. Runkle, 9 John. R. 147; M'Call v. Byram M. Co., 6 Conn. 428. But see Phillips v. Wickham, 1 Paige's Ch. R. 590.

2020. REX v. RUSSELL, 2 M. & S. 122.

Overruled in Rex v. Cox, 5 Car. & P. 297.

2021. REX v. RUSSELL, Leach's Cro. Cas. 10; Rex v. Taylor, ib. 255; Rex v. Rhodes, 2 Stra. 728; Rex v. Crocker, 5 Bos. & Pul. 87; Rex v. Thornton, Leach's Cro. Cas. 723.

That the person whose property may be prejudiced by a forgery, is no witness to prove the forgery on an indictment for the offence.

The contrary is the law of Massachusetts. Commonwealth v. Hutchinson, 1 Mass. 7; Commonwealth v. Snell, 3 Mass. 82. And of Pennsylvania. Respublica v. Keating, 1 Dal. 110; Pennsylvania v. Farrell, Addis. 246; Respublica v. Ross, 2 Dal. 239. See also Rex v. Broughton, 2 Stra. 1229; Abrahams v. Bunn, 4 Burr. 2251; 3 D. & E. 27; 7 D. & E. 60.

2022. REX v. ST. BENEDICT, 4 B. & Ald. 450.

Denied in the King v. The Inhab. of Leake, 2 Nev. & M. 583—Parke.

2023. REX v. ST. LEONARD'S SHOREDITCH, 12 Mod. 212; 2 Salk. 483, 524.

That the Sessions may set aside a poor's rate and make a new one, &c. Overruled in Rex v. Andrews, 3 Burr. 1458.

2024. REX v. SHAKESPEARE, 10 East, 87.

The like point as in Charnley v. Winstanley, ante.

2025. REX v. SHAW, 2 Salk. 482.

Overruled. Rex v. Guardians of poor of Chester, 3 D. & E. 496.

2026. REX v. STANSFIELD, Burr. 205, 220; S. C. 2 Str. 1193.

Overruled in Rex v. Driffield, 8 B. & C. 684.

2027. REX v. TOOLEY, 3 D. & E. 707.

"I thought the case of Rex v. Tooley had been overruled, though in gentle terms, by the subsequent cases of Rex v. Swift, (M. 30 G. 3.) and Welsford v. Todd," (8 East, 584.) Per Ld. Ellenborough in Hanley v. Cubberly, 15 East, 251.

2028. REX v. VINCENT, 1 Str. 481.

That a will of personal estate cannot be said to be forged, after probate granted.

Said to have been impeached in Rex v. Goodrich; Vid. 3 D. & E. 126. In Hibsham v. Dulleban, 4 Watts, 183—Gibson, C. J.:—"It has been repeatedly overruled." (See 4 Watts, 191.)

2029. REX v. WARDEN OF THE FLEET, 12 Mod. 341.

A dictum of Holt, C. J. overruled. Vid. Rex v. Dixon, 3 Burr. 1687; Anon. 8 Mass. 370; 1 Tyler, 147, acc.

2030. REX v. WATKINSON, 2 Str. 1122.

Being an indictment for perjury assigned on an answer in Chancery,

when the Master who took it could not identify defendant; the solicitor who was present at putting it in, the Ch. J. would not compel him to give evidence, and the defendant was acquitted.

Overruled in Studdy v. Sanders, 2 Dowl. & Ry. 347.

2031. REX v. WEBB, Stark. L. Ev. —Best.

If a witness remain in court after an order for all witnesses to withdraw, he cannot be examined, *although the attorney in the cause.*

Denied in Beamon v. Ellice, 4 C. & P. 585—Taunton. See Pomeroy v. Baddeley, R. & M. 430; Rex v. Colley, M. & M. 329.

2032. REX v. WESTON, 4 Burr. 2507.

Overruled. Rex v. Clifton, 5 D. & E. 502.

2033. REX v. WHITING, 1 Salk. 283; REX v. NUNEZ, 2 Str. 1043; REX v. ELLIS, 2 Str. 1104.

In these cases it was held that the sufferer by cheating, perjury, &c. could not be a witness, on an indictment for the offence.

But they are considered and overruled in Rex v. Broughton, 2 Str. 1229, and Abrahams v. Bunn, 4 Burr. 2251. Vid. also 3 D. & E. 27; 7 D. & E. 60; 4 East, 582; and Watts' case, post.

2034. REX v. WHITNEY, Bott's Poor-laws.

"Mr. J. Aston said that this case was incorrectly reported in Bott's Poor-law, in respect of what Mr. Justice Yates is there mentioned to have said." Cowp. 619; Vid. 5 Burr. 2637; 1 D. & E. 626.

2035. REX v. WILTS, 10 East, 404.

Doubted in Rex v. The Justices, &c., 3 Dowl. Pr. 311; Patteson—Rex v. Wilts—"is certainly one, in which some of the expressions have been, I will not say found fault with, but cautiously abstained from in later cases, because the judges thought they went too far."

2036. REX v. WOOD, 1 Moody Cr. Ca. 278; 4 Car. & P. 381, S. C.

Overruled in Rex v. Withers, 1 Moody Cr. 294; 4 C. & P. 446.—in respect to an *incised* wound.

2037. REX v. YOUNG AND GLENNIE, 2 Anstr. 448.

Overruled. Iggulden v. May, 2 N. R. 452; 7 East, 237; 9 Ves. Jr. 235.

2038. REYNELL v. LANGCASTLE, Cro. Jac. 545.

Same point as in Glover v. Kendall, ante. Overruled in Bonafous v. Walker, 2 D. & E. 126.

2039. REYNOLDS v. BEERLING, M. 25 G. 3. B. R. Doug. 112, note.

Plea of set-off on judgment obtained by defendant v. plaintiff after this action brought, but before plea pleaded, and held good.

"This point cannot be supported." Per Buller, J. in Evans v. Prosser, 3 D. & E. 186. Vid. also Le Brett v. Papillon, 4 East, 507; Andrews v. Hooper, 13 Mass. 476; Campion v. Barker, 2 Lutw. 1143.

2040. REYNOLDS v. BUCKLE, Hob. 326.

Ld. Holt in Jones v. Bodinger, Comb. 380, says "I take the case of Reynolds v. Buckle, Hob. 326, to be misprinted.—It was found for the defendant, which could not be, &c. 'defendant' instead of 'plaintiff.'" Vid. 4 Rawle, 343.

2041. REYNOLDS v. PITT, 19 Ves. 134.

'A hard case,'—*durum valde durum, sed sic ita lex est.* See Swanton v. Biggs, 2 Moll. 17.

2042. RICE v. SHUTE, Burr. 2611.

In an action *ex contractu* the non-joinder of a co-contractor as defendant can be taken advantage of by plea in abatement only.

Limited and explained in Cabell v. Vaughan, 1 Wms. Saund. 291. The non-joinder of a joint contractor cannot be taken advantage of in any way whatever; where it appears that the party not joined is only a secret partner; (Mullett v. Hook, 1 M. & M. 88; De Mantort v. Saunders, 1 B. & Ad. 398; overruling Dubois v. Ludert, 8 Taunt. 9; 1 Marsh. 246); and, therefore, if issue be joined upon a plea in abatement of nonjoinder, the jury are directed to consider *with whom had the plaintiff reason to believe that he contracted.*" See Waterbury v. Mather & Maurin, 16 Wend. 611, where in assumpsit against two, one was arrested and the other returned *not found;* and it appeared on the trial that the defendant not brought in was misnamed (being called *John* instead of *George,*) the plaintiff was nonsuited.

2043. RICH v. ALDRED, 6 Mod. 216.

Doubted by Mr. J. Story (Com. on Bail. 192, 3.): "There is great reason to doubt the accuracy of the report."

2044. RICH v. TOPPING, 1 Esp. 176; Peake's Cas. 224.

The indorser of a bill was admitted by Ld. Kenyon to prove usury in the transfer of it to the indorsee.

Denied in Churchill v. Suter, 4 Mass. 156; Vid. acc. 2 Dall. 194; 1 Day's Ca. 17. 301; 1 Caines, 258. 267; 1 Hen. & Munf. 175; 1 Hayw. 397, n.; 2 Cranch, 202.

2045. RICHARDS LE TAVERNER'S CASE, Dyer, 56 (a).

S. P. as in Rawlins' case, (ante).

2046. RICHARDS v. MURDOCK, 10 B. & C. 527.

Where it seems to have been held, that underwriters were admissible to give their opinion, as a matter of judgment, as to the materiality of the matters not communicated at the time of effecting an insurance.

Overruled in Campbell v. Rickards, 5 B. & Ad. 840.

2047. RICHARDS v. SYMES, 2 Atk. 319; 3 Barnard, 90; and 2 Eq. Ca. Abr. 617.

Doubted in Hassell v. Tynte, Ambler's R. 318, Ld. Hardwicke said —"That the case of Richards v. Symes was not a precedent of very considerable value." But in Duffield v. Elwes, 1 Bligh's R. 538, 9, Lord Eldon said: "but the case as there reported, (2 Eq. Cas. Abr.) is reported from a manuscript note, and from a manuscript note which I think is better entitled to credit for this reason; that having called in assistance in this case (which I believe will be the first absolute determination upon the subject, though I think there is a great deal laid down in the cases which ought to lead us to decide what ought to be a good *donatio mortis causa*,) I have found authority to consider that report to be a very correct report, in the library and in the mind which are both equally large store-houses of equity learning,—I mean the library and mind of Lord Redesdale."

2048. RICHARDSON v. LEARNED, 10 Pick. 261.

The action was sued by the trustee of the wife's property; and held, that the husband was a competent witness.

Doubted. Vide Davis v. Dinwoody, 4 Term, 678; 1 Phill. Ev. (7 Lond. ed.)

2049. RICHETTE v. STEWART, 1 Dall. R. 317; 2 ib. 196.

It *seems*, that the *protest* of the captain and a majority of the crew, made before a notary public, or for want of one before a magistrate, in the first port recently after arriving there, is evidence in chief for the *insurer*.

Denied in 2 Phill. Ev. 56, and note. Doherty v. Farris, 2 Yerg. R. 73.

2050. RICKARDS v. MURDOCH, 10 B. & C. 527.

Overruled in Campbell v. Rickards, 2 Nev. & M. 542.

2051. RIDDEL v. SUTTON, 5 Bing. 200.

S. P. as in Barry v. Smith, (ante).

2052. RIDLEY v. M'GHEE, 2 Dever. R. 40.

Doubted in Moore v. Collins, 3 Dever. R. 140.—Ruffin.

2053. RIDLEY AND ANOTHER v. TAYLOR, 13 East, 175.

Burthen of proof in respect to partnership paper.

Distinction or "difference, (said Spencer, J. in Dob v. Halsey, 16 John. 38, 39.) between the decisions of this court and that of the King's Bench, consists in this: We require the separate creditor who has obtained the partnership paper for the private debt of one of the partners, to show the assent of the whole firm to be bound. The rule of the King's Bench throws the burthen of avoiding such security on the firm, by requiring them to prove, that the act was covinous on the part of the partner, for whose private debt the paper of the firm was given, by showing that it was done without the knowledge, and against the consent, of the other partners, and that the fact was known to the separate creditor when he took the paper of the firm." (See 11 S. & R. 387.)

2054. RIGGS v. MURRAY, 2 J. Ch. R. 572; 3 ib. 160. S. C.

Reversed in 15 John. R. 571.

2055. RINGGOLD v. GALLOWAY, 3 H. & J. 451. 455.

Overruled in Snavely v. M'Pherson, 5 Har. & J. 150.

2056. RINGSTEAD v. LANESBOROUGH, (LADY) 3 Dougl. R. 197.

Overruled in Marshall v. Rutton, 8 T. R. 545. Sed see 3 Dougl. R. S. C. n. (a). (See No. 178. ante).

2057. ROBBINS v. LUCE, 4 Mass. 474.

In an action on a promise to deliver specific articles at a given day and place, defendant may plead in bar that he was ready at the day and place to deliver the articles; "he could not tender them unless the plaintiff was there."

Denied in Smith v. Loomis, 7 Conn. R. 110.

2058. ROBERTS v. ANDERSON, 3 J. Ch. R. 371.

"The original deed from the debtor to a fraudulent grantee *is utterly void* as to creditors; and as against them, the grantee can make no conveyance, for he has no title as against them."

Reversed in S. C. 18 Johns. R. 518; Martin v. Cowles, 1 Dev. & B. 29.

2059. ROBERTS v. BARKER, 1 Cromp. & Me. 809.

The out-going tenant in England is entitled to the manure made during the term.

Oppo. Lassell v. Reed, 5 Greenl. R. 222; see Lassell v. Reed, (post).

2060. ROBERTS v. DIXWELL, 1 Atk. 607.

A husband may have curtesy in an estate although it be given to her separate use.

Overruled in Hearle v. Greenbank, 1 Ves. 298; 3 Atk. 716, S. C. But see 4 K. C. 30.

2061. ROBERTS v. DOWNES, Pr. Reg. C. P. 399.

The court refused to put off a trial on account of the absence of a witness, where the defence was a set-off, of which notice had been given, saying that this was a collateral fact.

Oppo. Gibbes v. Mitchell, 2 Bay, 351, and Lee v. Andrews, 10 Mart. L. R. 682.

2062. ROBERTS v. HARNAGE, 6 Mod. 228.

Said to be an inaccurate state of the case; and to be more truly reported in 2 L. Raym. 1042. Per Ld. Mansfield, Cowp. 178.

2063. ROBERTS v. HOLT, 2 Show. 443.

That if a merchant in Ireland consign to one in England, and the master sign the bill of lading, the merchant in England is liable for the freight.

The accuracy of this note was doubted by the Court in Christy v. Row, 1 Taunt. 312; Vid. Lickbarrow v. Mason, 2 D. & E. 63; 1 H. Bl. 357; 5 D. & E. 367; Stubbs v. Lund, 7 Mass. 453.

2064. ROBERTS v. READ, 16 East, 215.

Doubted in Sutton v. Clarke, 1 Marsh. 429; 6 Taunt. 29—Gibbs:—But recognized in Blakemore v. Glanmorganshire Canal Co., 3 Y. & J. 73—Hullock, B.

2065. ROBERTSON v. UNITED INS. CO., 2 J. Cas. 252—Kent, J.

S. P. as in Joice v. Williams, (ante).

2066. ROBINS v. SEYWARD, 1 Str. 441.

That an attachment for non-performance of an award is a criminal prosecution.

Denied per Buller, J. in Rex v. Myers, 1 D. & E. 266.

2067. ROBINSON v. UNITED INS. CO., 1 Johns. 611; JUMEL v. MARINE INS. CO., 7 ib. 426; and OGDEN v. FIRE INS. CO., 10 ib. 180; 12 ib. 31. S. C.

Seem to establish the principle, that the acceptance by the insured for his own benefit, of a purchase of the thing insured, made for account of the owner, is *per se*, a waiver of the abandonment; and converts the otherwise total, into a partial loss.

Denied in Maryland and Phœnix Ins. Co. v. Bathurst, 5 G. & J. 159. 231.

2068. ROBINSON v. MACDONNELL, 5 M. & S. 228.

That unearned freight cannot be the subject of assignment.

Overruled in Leslie v. Guthrie, 1 Bing. N. C. 697: *quoad hoc.*

2069. ROBINSON v. NICHOLS, 2 Str. 1077.

Same point as in Gammage v. Watkin, ante. Overruled in Lewis v. Pottle, 4 D. & E. 570.

2070. ROCK v. ROCK, Yelv. 175; Cro. Jac. 245.

Denied per Holt, C. J. in Booth v. Johnson, 7 Mod. 145; 2 Ld. Raym. 838. S. C.; Barnehurst v. Cabbot, Hardr. 5; Totnam v. Hopkins, Godb. 350. acc.; Co. Lit. 303, b.

2071. ROCKE v. DAYRELL, 4 T. R. 402.

S. P. as in Uppom v. Sumner.

Denied in Giles v. Grover, 6 Bligh's P. R. 303, 4—Patteson, J.

2072. ROCKWELL v. ADAMS, 6 Wend. 467.

Reversed in Adams v. Rockwell, 16 Wend. 285.

2073. ROEBUCK v. DEAN, and PERRY v. WOODS, 3 Ves. 294.

Overruled in Cripps v. Wolcott, 4 Madd. Ch. R. 11.

2074. ROE v. ASHBURNER, 5 T. R. 163.

Qualified in Warman v. Faithful, 3 Nev. & M. 137. The doctrine of Ld. Kenyon has been qualified by later decisions, which say, "that where it is to be collected, notwithstanding the stipulations for a future lease, that the parties intended that in the meantime the agreement should be binding, such agreement shall operate as a present demise."

2075. ROE ex dem. WEST v. DAVIS, 7 East, 363.

Denied by Kent, C. J. in 11 John. R. 4:—"The court of K. B. consider it as a given point (7 Term, 117), that the plaintiff must prove either a demand or no sufficient distress; and in Jackson v. Wilson, in this court (3 John. Cas. 295), the same doctrine was recognised."

2076. ROE d. BUSHELL v. GORE, at Lancaster Summer Assizes, 1763, cited in Rex v. Eriswell, 3 Term, 719.

In questions of pedigree, the declarations of others besides members of the family are admissible.

Denied in Johnson v. Lawson, 2 Bing. R. 86:—Best, C. J.—"As to

the Nisi Prius case at Lancaster, I wish such cases were never cited."—"It misled the court in Rex v. Eriswell."

2077. ROE v. HARVEY, 4 Burr. 2424. 2484.

Doubted in 1 Phill. Ev. 427, (6 ed.) In Bate v. Kinsey, 4 Tyrw. R. 667—Alderson, B. says, "it is a strange decision."

2078. ROE v. PEARCE, 2 Camp. R. 96.

Overruled in Doe v. Warlers, 10 B. & C. 626; the Court, particularly Littledale, J. appeared to think that in a case where a *previous* authority was requisite to enable an agent to act, the effect of which would be to raise a duty towards the principal from a third person, and subject such person to an action for its non-performance; in such case, a subsequent adoption is not sufficient.

2079. ROE, LESSEE OF BRISTOW v. PEGGE, 4 Doug. 309.

In ejectment the tenant shall not be allowed to set up an outstanding term in trustees to secure an annuity, provided the lessors of the plaintiff do not seek to disturb the possession of the trustees.

Overruled in cases cited in note to S. C.

2080. ROFFEY v. SHALLCROSS, 4 Madd. R. 227, note.

That purchasers of different lots are not to be connected together, unless there has been an understanding that the buyer should not take any if he could not have all.

Explained in Casamajor v. Strode, 1 Coop. Sel. Cas. 510. (8 Cond. Ch. R. 516): Held, the court will not discharge a purchaser from his contract for one lot on the ground that the title to the other is bad, unless it be satisfied, upon a full examination of all the circumstances, that he would never have bought except in the expectation of possessing both lots. See Sug. V. p. 298.

2081. ROGERS v. SEALE, 2 Freeman, 84.

A *bona fide* purchaser without notice, or a witness in rightful possession by any other means, is no reason why he should be protected from answering questions affecting his own title.

Oppo. Burlace v. Cooke, 2 Freeman, 24; Parker v. Blythemore, 2 Eq. Ca. Abr. 79; 1 Pre. in Ch. 58; Jerrard v. Saunders, 2 Ves. 454. Also Sir Edw. Sugden, (2 Sug. on V. p. 309).

2082. *ROLLE'S ABR.—Sir M. Hale's Pref.*—informs that this is a posthumous work which never underwent the last hand or pencil of the judicious author, and such works, though, when published, they may advantage others, yet they rarely come out to the due advantage of the author.

'An excellent work, and in point of method and succinctness and legal precision, a model of a good Abr.' 1 K. C. 599.

2083. ROLL. ABR. 18; citing Morning v. Knop, Cro. Eliz. 706.

Denied in Ross on Vendors, p. 116.

2084. 1 ROL. ABR. 63, pl. 31.

Denied per Holt, C. J. in Iveson v. Moor, 1 Com. Rep. 60.

2085. ROLL. ABR. DETIN. C. 606; 9 Hen. 6. 58.

The original bailor may demand the goods from his bailee and also from the second bailee; but it is said that if the latter has delivered the goods to the first bailor, he cannot thereby defend himself against the action of his immediate bailor (the first bailee).

Denied in Story Bailm. p. 81. But see and examine Wilson v. Anderton, 1 B. & Ad. 450.

2086. 2 ROLLE'S ABR. 124—(S. P. as in Griswold v. Penniman, (ante).

Denied in Wintercast v. Smith, 4 Rawle, 183.

2087. 2 ROL. ABR. 415, pl. 8.

Same point as in Blackwell v. Nash, ante. Said per Ld. Kenyon to "outrage common sense." Goodison v. Nunn, 4 D. & E. 764.

2088. 2 ROL. ABR. "EXECUTOR," 909. I. pl. 5.

That *bona notabilia* shall be accounted £5 at least.

Denied per Ld. Hardwicke, as "a single loose saying in an abridgment, contrary to the general reason and principles of law." 2 Atk. 659.

2089. 2 ROL. ABR. 303, pl. 27.

"Cannot be supported." Per Buller, J. in Camden v. Home, 4 D. & E. 398.

2090. 2 ROL. ABR. 306, pl. 13.

That if a person lease to a parishioner the tithes of his estate, and afterwards sue for them in kind, no prohibition lies, &c.

Denied per Buller, J. in Camden v. Home, 4 D. & E. 397.

2091. 2 ROL. ABR. 491. D. pl. 5.

That if a *supersedeas* comes after goods taken in execution, and before sale, they shall not be sold, &c.

Denied in Meriton v. Stevens, Willes, 281.

2092. ROPER v. RADCLIFFE, 9 Mod. 170, 171.

Overruled in Craig v. Leslie, 3 Wheat. 564. 577; Rinehart and Wife v. Harrison, 1 Baldwin's R. 177.

2093. 1 ROPER'S HUSBAND & WIFE, 462.

"If the jointure be limited to the wife after the death of her husband, *durante viduate*, or upon condition that she perform her husband's will, &c. such limitations, made in lieu of dower, will be good legal jointures."

Denied in M'Cartee v. Teller, 2 Paige's Ch. R. 592:—'unless after the husband's death, she enters and accepts the conditional estate.'

2094. ROPER TR. ON LEGACIES, p. 26.

'It is necessary that the gift be made in peril of death, *or* during the donor's last sickness, and to take effect only in case he die.'

Denied in Nicholas v. Adams, 2 Whart. R. 22—Gibson, C. J.

2095. RORKE v. DARYELL, 4 T. R. 402.

Oppo. Rex. v. Wells, 16 East, 278, n. Held, that goods seized under a *fi. fa.* at the suit of a subject, are before sale liable to be taken by virtue of the king's extent, tested after the delivery of the *fi. fa.* to the sheriff.

2096. ROSE v. BARTLETT, Cro. Car. 293.

That if one having freehold lands and leases for years, devise all his lands, the freehold lands will only pass.

Doubted. See Turner v. Husler, 1 Bro. C. C. 78—Eyre. Lane v. Earl Stanhope, 6 T. R. 358; But see Bistol v. Riccardson, 3 Dougl. 370, n. (a). (b).

2097. ROSE v. BLAKEMORE, Ry. & Mo. 382; 2 Stark. R. 158; 16 Ves. 64.

In the course of the cause a witness refused to answer a question, whether he had published a particular hand-bill, on the ground that he had been threatened with a prosecution for the publication; and Abbott, Ld. C. J. held the excuse sufficient, and said that no inference of the truth of the fact ought to be drawn from that circumstance.

Doubted in S. C. in note.

2098. ROSE v. GANNEL, 3 Atk. 439.

Imperfectly reported. See Schroeppel v. Redfield, 5 Paige Ch. R. 248.

2099. ROSE v. HIMELEY, 4 Cranch, 241.

Overruled in Hudson v. Guestier, 6 Cranch, 281.

2100. ROSHER v. KIERAN, 4 Camp. 87; 2 ib. 373; 1 Stark. R. 34; 1 T. R. 167; 7 Ves. Jun. 597; 2 Camp. 177.

Overruled in Chapman v. Keane, 4 N. & M. 607:—Held, that *notice of dishonor* of bill is sufficient if given by any one who is party to the bill, and need not proceed either immediately or derivatively from the *holder*. See Stanton v. Blossom, 14 Mass. 116.

2101. ROSS v. GOULD, 5 Greenl. 204.

To the point, whether a disseisin can be committed by mistake.

Denied in Ross v. Gould, 7 Conn. 446.—Hosmer, C. J:—Held, that a disseisin may be committed by mistake.

2102. ROOT v. FRENCH, 13 Wend. 570; Payne v. Cutler, ib. 605; Wardell v. Howell, 9 ib. 170; Rosa v. Brotherson, 10 ib. 85; Fulton Bank v. Phœnix Bank, 1 Hall, 562; 20 John. 637.

An antecedent debt is not considered in New York, as such a valuable consideration as will support the claim of a *bona fide* holder of a negotiable instrument, to the injury of the right of the original parties.

Oppo. Brush v. Scribner, 11 Conn. 388—Williams, C. J.

2103. ROWE v. YOUNG, 2 Bro. & Bing. 165; 2 Bligh R. 391.

Held, that if a bill of exchange be accepted payable at a particular place, the declaration in an action against the acceptor, must aver presentment at that place, and the averment must be proved.

Denied in U. S. Bank v. Smith, 11 Wh. R. 175:—'A contrary opinion has been entertained by courts in this country, that a demand on the maker of a note, or the acceptor of a bill payable at a specific place, need not be averred in the declaration, or proved on the trial.' It is different in respect to the indorsee of a bill or note. (See 3 Fairf. 21.)

2104. ROWEL v. WALLEY, 1 Rep. in Ch. 219.

Overruled in White v. White, 4 Ves. Jun. 24. But see White v. White, 9 Ves. Jun. 554.

2105. ROWLAND v. STEPHENSON, 1 Hals. 149.

Overruled in Wood v. Malin, 5 Hals. R. 216, citing Sturges v. Crowninshield, 4 Wheat. R. 197.

2106. ROWNTREE v. JACOB, 2 Taunt. 141.

The deed recited a consideration "so much in hand paid, at or before the ensealing and delivery hereof:"—on the back of it was a receipt for the money as having been paid on the day and year aforesaid:—Held, that the evidence of the deed was conclusive.

Doubted in M'Crea v. Purmont, 16 Wend. 467.—Cowen.

2107. ROW'S CASE, Russ. & R. 153; 1 Phil. Ev. 104, S. C.

When the promise or threat proceeds from a person who has no power to enforce it, and who possesses no control over the prisoner, a confession made under such circumstances is admissible.

Doubted in Dunn's case, 4 C. & P. 543: "Any person telling a prisoner that it will be better for him to confess, will always exclude any confession, made to that person. Whether a prisoner's having been told by one person, that it will be better for him to confess, will exclude a confession subsequently made to another person, is very often a nice question. See Long's case, 6 C. & P. 179.

2108. ROYAL FISHERY OF THE BANNE, Davies' R. 149.

That the grant of the king passes nothing by implication.

Denied by Mr. J. Story, in Charles River Bridge v. Warren Bridge, 11 Pet. R. 595:—'the case cited to support it is directly against it.'

2109. RUAN v. GARDNER, 1 Wash. C. C. R. 145.

Doubted in Hicks v. Fitzsimmons, 1 ib. 279, n. (b).

2110. RUAN v. PERRY, 3 Caines' R. 120.

Held, that in an action of tort, charging gross misconduct upon circumstances merely, evidence of character was admissible to repel the charge.

Overruled in Fowler v. The Ætna Ins. Co., 6 Cowen, 673; Norton v. Warner, 9 Conn. 172; Gough v. St. John, 16 Wend. 646. 653; Humphrey v. Humphrey, 7 Conn. 116; Potter v. Webb, 6 Greenl. 14.

2111. RUDGE v. BIRCH, 1 T. R. 622.

S. P. as in Bottomly v. Brook, (ante).

2112. RUE v. MITCHELL, 2 Dall. 58.

"You have taken a false oath before 'Squire R." *Innuendo* perjury in a cause before W. R., Esq.—Held good after verdict.

Contradicted by Packer v. Sprangler, 2 Bin. 60; Shaffer v. Kintzer, 1 Bin. 537.

2113. THE RUGBY CASE, 11 East, 375, n.

Where the public had the free use of the way for eight years it was too late for the plaintiffs to resume it. And Lawrence, J. (in 5 Taunt. 137), said, no particular time is necessary for evidence of a dedication; it is not, like a grant, presumed from length of time: if the act of dedication be unequivocal, it may take place immediately; for instance, if a man builds a double row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway.

Doubted in Woodyer v. Hadden, 5 Taunt. 125; and see the observation of Lawrence, J. (in p. 138), as to an error in the report; and 3 K. C. 450, *et seq.*

2114. RUGGLES v. KIMBALL, 12 Mass. R. 337.

Doubted in Baldwin v. M'Clinch, 1 Greenl. R. 110.

2115. RUNDALL v. ELEY, Carter, 92. 170.

Overruled. Doe v. Beauclerk, 11 East, 666; Porter v. Fry, 1 Vent. 199; Walloon v. Fitzgerald, Skin. 125. acc.

2116. RUSSELL v. RUSSELL, 1 Bro. C. C. 269.

Leading case of equitable mortgages by deposite of title deeds.

Doubted. Cawthorne, Ex parte, 1 Glyn & Jam. 242; Sed see 3 Pow. on Mort. p. 1051, *et seq.*

2117. RUSSELL'S CASE, 1 Moo. & Rob. 122.

Overruled in Jenning's case, 4 C. & P. 249; Cozin's case, 6 C. & P. 351; Reekspear's case, 1 Mood. C. C. 342; Cox's case, ib. 337; 5 C. & P. 297.

2118. RUTTER v. BALDWIN, 1 Eq. Ca. Ab. 226.

Doubted in Le Texier v. The Margravine of Annpage, 15 Ves. Jun. 165.—Lord Eldon said, that he had great difficulty in acceding to the case of Rutter v. Baldwin—"Whether it is meant to intimate, that the wife herself was to be a witness to prove that the husband concealed the marriage, with the view of enabling her to deal with the world: or, that being established by legitimate evidence of other witnesses, she was to prove herself an agent, and that she did the acts as such, I doubt the policy of admitting her evidence, even to that extent." See 3 V. & B. 165.

2119. RYALL v. LARKIN, 1 Wils. 155.

Impeached in Ridout v. Brough, Cowp. 135.

2120. RYMER v. COOK, 1 Mood. & Malk. 86, note (a).

Hullock, B. and Bailey held, that if a defendant prove payment to a plaintiff, by showing the particulars of demand, delivered under a judge's order, in which the plaintiff has credited the defendant, this is the evidence of the defendant, and entitles the plaintiff to reply.

Oppo. Brittingham v. Stevens, 1 Hall's R. 379, and Brown v. Watts, 1 Taunt. 353. The particulars are a part of the pleadings; not evidence. Harrington v. M'Morris, 5 Taunt. 228.

2121. SADDLER v. HOBBS, 2 Bro. Ch. R. 117; Toller's L. of Ex'rs, &c. 484.

That a creditor cannot charge an executor when legatees could not.

Oppo. 2 Fonb. 83. 94; Gibbs v. Herring, Prec. Ch. 49, and Case of M'Nair's Appeal, 4 Rawle, 148. 154, and the cases cited by Mr. J. Kennedy.

2122. SAGE v. WILCOX, 6 Conn. 81; See 9 S. & R. 202, and 8 Pick. 423.

"I hereby guaranty the payment of the within note one year from this date, whether a suit is brought against the signer (J. W.,) or not;" *held*, that a demand on the signer was essential.

Denied in Read v. Cutts, 7 Greenl. 191—Mellen, C. J.—"The decision is at variance with Williams v. Granger, (4 Day, 444) and several other important cases, among which is Allen v. Brightmore, (20 John. 365.)

2123. SAINT PAUL & UX. v. E. OF RIVERS, Sir T. Raym. 128; *in margine.*

Overruled. Barber v. Fox, 2 Saund. 137; Porter v. Bille, 1 Freem. 125.

2124. SALISBURY v. BAGOT, 1 Ch. Ca. 278; 2 Freem. 21.

Bill for specific performance of articles made 60 years before. Defence *fine and non-claim:* and on this ground the bill was dismissed, though it was proved that defendant had notice of the trust, &c.

But the contrary is holden in Bovey v. Smith, for that the fine is but a conveyance, which if made to one having notice of the trust, could not alter the estate. 2 Ch. Ca. 124; 2 Com. Dig. 627; 1 Sch. & Lefr. 378.

2125. SALKELD'S REPORTS.

Ch. J. Parsons, (8 Mass. 258,) said, 'the third vol. of Salk. was a book of no authority.' See 2 East, 8, note (b); 7 Mod. 269, which are to the same effect.

2126. SALMON v. BENNETT, 1 Conn. R. 525.

That a distinction exists in the case of a voluntary conveyance, between the children of the grantor and strangers, and that mere indebtedness at the time, will not, in all cases, render a voluntary conveyance void as to creditors, where it is a provision for a child; that an actual or express intent to defraud need not be proved, for this would be impracticable in many instances where the conveyance ought not to be established, and it may be collected from the circumstances of the case; that if there be no fraudulent intent, and the grantor be in prosperous

circumstances, unembarrassed, and not considerably indebted, and the gift a reasonable provision for the child, leaving ample funds unincumbered, for the payment of the grantor's debts, the voluntary conveyance to the child will be valid against existing creditors.

Denied in Reade v. Livingston, 3 J. Ch. R. 592, *et seq.* (acc. also Jackson v. Seward, 5 Cowen, 67. 73:—"I have not been able to find the case in which a mere voluntary conveyance to a wife or child has been plainly and directly held good against a creditor existing at the time."

2127. SALUCCI v. JOHNSON, 4 Dougl. 224.

The right to search neutrals is part of the law of nations.

Denied in Garrells v. Kensington, 8 T. R. 230; Maria, Paulson, 1 Rob. Adm. R. 360.

2128. SAMM'S LESSEE v. ALEXANDER, 3 Yeates, 268, and Heister's Lessee v. Forner, 2 Binn. 40.—S. P. Yelv. 179.

Overruled in Arnold v. Gorr, 1 Rawle, 223, 227, as to the dicta of Judge Yeates.

2129. SANDBACK v. THOMAS, 1 Stark. 306.

That in an action for a malicious prosecution, the plaintiff is entitled to a complete indemnification; and may increase the damages by the amount of the extra costs.

Denied in Grace v. Morgan, 2 Bing. N. C. 534.

2130. SANDERSON v. BOWES, 14 East, 507.

Was the case of a note payable at the Workington Bank; and Bayley, J. says "when a person binds himself, even by bond, to pay at a particular place, then he is not holden at any other place; and the demand must be made upon him there. So here, the defendants having contracted to pay, on demand, at a particular place, are not liable but upon a demand at that place."

Denied in Haxtun v. Bishop, 3 Wen. R. 20, 21, and in Ruggles v. Patten, 8 Mass. R. 480.

2131. SANDON v. BOURNE, 4 Camp. 68.

Held, that a bill was taxable which contained a charge for the preparing of a warrant of attorney, with a view to business to be done in court.

Overruled in Burton v. Chatterton, 3 Barn. & Ald. 486.

2132. SANDS, (CASE OF,) U. STATES LAW, J. 1 Vol. p. 15.

That the entire jurisdiction of matters under the U. S. bankrupt law was in the district court.

Overruled in Lucas v. Morris, 1 Paine's C.C. R. 396.

2133. SANDS v. LEDGER, 2 Ld. Raym. 792.

Ld. Holt at N. P., is reported to have held, in a case where the power was to make leases to be in possession and not in reversion, a lease was granted, and then, before the determination of it, another, that by the first lease, the power was suspended for the time of the lease, but that being expired he inclined that the second lease was good.

Denied in Sug. on Pow. 210 (Am. ed.) (Lond. 387).

2134. SARSFIELD v. WITHERLEY, Comb. 152.

S. P. as in Butler v. Play, (ante).

2135. SATTERLEE v. MATTHEWSON, 2 Pet. R. 380.

This case has been supposed to establish the principle that the legislature has the power to pass retrospective acts, which may impair vested rights, provided the obligation of a contract is not impaired.

Doubted in Martindale v. Moore, 3 Black. R. 275; and also the case of Overton v. Tracy, 14 S. & R. 311.

2136. SAUNDERS v. MUSGRAVE, 2 C. & P. 294.

Overruled in S. C., 6 B. & C. 524.

2137. 2 SAUND. 72, b.—Williams.

"The recognizance upon which the *scire facias* is founded, being joint and several, and the purport of it being to have execution to the form and effect of the recognizance; it therefore follows, that although the *scire facias* be joint, the execution may be several."

Commented upon by Ewing, Ch. J. in The State v. Stout et al., 6 Hals. R. 362, who says "neither the doctrine of the annotator, nor the case he has cited, sustains the propriety of issuing several writs at the same time."

2138. 2 SAUND. 117. d. n. 2.

Denied in Ord v. Fenwick, 3 East, 104, and Cowell v. Watts, 6 ib. 405, and other cases which have been considered since Mr. Sergeant Williams wrote. The rule now is, that counts may be joined in one declaration, whenever the money received will be assets in the hands of the executor.

2139. SAVAGE v. CARROLL, 1 Ba. & Be. 548.

Ld. Chan. (in Kelsall v. Kelsall, 2 Myl. & K. 414.)—"That case of Bennet v. Lee, (2 Atk. 529,) was made the ground of the decision in Savage v. Carroll, in which I must observe that the doctrine was carried two steps further than the authorities in strictness warrant," &c.

2140. SAVAGE v. DENT, 2 Str. 1067.

A barrel of beer being left in the house by the lessee, it was holden that the house could not be considered a vacant possession.

Denied in M'Dougal v. Sitcher, 1 Johns. 44.

2141. SAVAGE'S CASE, 2 Leon. 109. 208.

The custom was, that if a man married a customary tenant, had issue, and outlived her, he should be tenant by curtesy. The wife took a customary tenement by descent, *during coverture*, and it was held that the husband should not be tenant by curtesy, as the wife was not customary tenant at marriage.

Denied to be law. 2 Ld. Raym. 1020.

2142. SAVIL, 11 Com. Dig. Tit. Piscary.

That every owner of a ferry must have the land on both sides of the water; otherwise he cannot land.

Denied in Peter v. Kendall, 6 B. & C. 703.

2143. SAVILL v. BARCHARD, 4 Esp. R. 53—Kenyon:

Held, that a dyer has a lien for a general balance.

Overruled. Bennett v. Johnson, 2 Chit. R. 455; 3 Dougl. 387; S. P. Green v. Farmer, 4 Burr. 2214; 1 W. Black. 651.

2144. SAYER v. BENNETT, cited, Watson, Partn. 382.

Questioned in Waters v. Taylor, 2 Ves. & Beame, 299.

2145. SCARBOROUGH v. LYRUS, Latch, 252.

Dictum of Jones, J. overruled in case of Gratitudine, 3 Rob. Adm. 272; 2 Molloy, b. 2, c. 11. sec. 11. acc.

2146. SCARMAN v. CASTEL, 1 Esp. 270.

That a master is bound to pay for medicines, &c. for his servant.

The contrary had before been holden in Newby v. Wilshire. Vid. 1 Esp. 739, and was afterwards fully recognized in Wennall v. Adney, 3 B. & Pul. 247.

2147. SCHERMERHORN v. SCHERMERHORN, 1 Wend. 119.

The rule excluding a party to the record to testify, rested on policy as well as interest.

Oppo. Affalo v. Fourdrinier, 6 Bing. 306; Bate v. Russell, 1 Moo. & Malk. 332.

2148. SCERMERHORN v. VANDERHEYDEN, 1 John. R. 139; 3 ib. 510; 7 ib. 342; 2 J. Ch. R. 43.

S. P. as in Clarkson v. Hannay, (ante).

2149. SCHIEFFELEN v. N. Y. INS. CO., 9 John. R. 91.

Explained in Saltus v. Ocean Ins. Co., 12 John. R. 112.

2150. SCHINOTTI v. BUMSTED et al., 6 T. R. 646.

Commissioners of a lottery by statute were authorised: "that if any contention or dispute shall arise in adjusting the property of the said fortunate ticket, the major part of the said managers and directors agreeing therein shall determine to whom it doth or ought to belong." Lawrence, J. says, the that the above clause in the statute does not give them (commissioners or managers) judicial authority to decide between contending parties, which of them is entitled to any prize, but merely to decide among themselves in case they are divided in opinion.

Doubted in Briggs v. Murdock, 13 Pick. 305. 319, 320—Wilde.

2151. SCHURRMELL v. LOURADA, 4 Taunt. 695.

Explained and corrected in Tremani v. Barrett, and Tremani v. Faith, 6 Taunt. 88.

2152. SCOTT et al. v. LIFFORD, 1 Camp. 249.

When the parties resided in London, or in the near neighborhood of it, the party sending a notice (of the dishonor of a bill) may avail himself of the convenience of the two penny post, and was not obliged to despatch a special messenger.

Decided differently in this country; and Spencer, J. in Ireland v. Kip, 11 J. R. 232; 'decisions in other countries on such points are entitled to little consideration.'

2153. SCOTT v. M'INTOSH, 2 Camp. 238.

When this case was cited, Gibbs, C. J. (in Tomkins v. Wiltspire, 1 Marsh. R. 116.) said, a sad use is made of these N. P. cases. This case never could have been tried; and there is a decency in not pressing cases to a conclusion.'

2154 SCOTT v. SCOTT, Ambl. 383; Eden R. 458.

The case said to be right, but the reasons wrong. Vid. Doe v. Timmins, 1 Barn. & Ald. 530. 532.

2155. SCOTT v. SHEPHERD, 2 W. Blackstone, 892.

Trespass and assault will lie, for originally throwing a squib, which, after having been thrown about in self-defence by other persons, at last put out the plaintiff's eye.

Doubted in Fitzsimmons v. Inglis, 5 Taunt. 534; and the authority of the case slighted. But "it is perfectly clear, that if an injury be done to A. by the immediate force of B., the former may bring trespass; and it is equally clear that if the injury be not immediate, but merely consequential, he cannot sue in trespass; and that his remedy, if any, is by action

—"Those cases were governed by the English decision, in Terry v. Dantze, (2 H. Bl. 389); but from a more full consideration of the subject, we are now led to believe that the C. B. carried too far the principle of mutual and independent covenants."

2163. SEIXAS v. WOODS, 2 Caines, 48.

It seems, held that a warranty could not be implied that the article sold was according to the description, against latent defects, where the buyer has the same opportunity of judging as well as the seller.

Overruled in Oneida M. Co. v. Lawrence, 4 Cowen, 444. and Boorman v. Johnson, 12 Wend. 566.

2164. SELBY v. EDEN, 3 Bing. 611; 11 Moore, 511, S. C.; Fayle v. Bird, 6 B. & C. 531; 2 C. & P. 303, S. C.

Held, that although the drawer of a bill has, in the body of it, required payment to be made at a particular place, and the drawee has accepted it payable there, yet, unless the acceptor has introduced the express terms required in the act, his acceptance is to be considered as general, and that, at least, it is not necessary in an action against *him*, to prove any presentment at the particular place named in the bill or in his acceptance, or indeed any presentment at all.

Overruled in Gibb v. Mather, 8 Bing. 214. Tindal, C. J. delivered the judgment of the Court of Ex. Ch.—"That where a bill is *drawn* payable at a particular place, and the drawee accepts it payable at that place, in an action against the *drawer*, presentment to the acceptor at that place must be proved, and consequently must be alleged; nor will the fact that the special acceptance payable at the bankers, (but not complying with the requisites of 1 & 2 Geo. 2. c. 78), was made before the bill passed out of the hands of the drawer, dispense with the necessity of such proof, or vary his liability."

2165. SELECT CAS. IN CHANCERY.

Lord Redesdale, 2 Scho. & Lef. 634, 'A book of no great authority.'

2166. SELKRIG v. DAVIES, 2 Bro. P. C. 242:—(acc. Sigourney v. Munn, 7 Conn. 11; 4 Mumf. 316; 3 K. C. 37);—and overruling Dixon v. Thornton, 3 Bro. Ch. C. 199.

2167. SELLS v. THE ADMINISTRATORS OF HUBBELL, 2 John. Ch. R. 397.

Doubted in Sterling v. Brightbill, 5 Watts, 232. It seems, as to what the *Chan.* seems to say in respect to the interest of partners—"*they are to be presumed to be equal.*'

2168. SEMAYNE'S CASE, 5 Rep. 93; Bac. Abr. Sheriff, N. 3.

Lord Coke says—"It was resolved by Littleton and all his companions (Year Books, 18 E. 4, f. 4,) 'that the sheriff cannot break the defendant's house by force of a *fi. fa.*, but he is a trespasser by the breaking, and yet the execution which he doth in the house is good.'"

Denied in Isley v. Nickols, 12 Pick. 270—Shaw, C. J. (Luttin v. Benin, 11 Mod. 50;) "for no lawful thing, founded on a wrongful act, can be supported." "This point was not raised or decided in Semayne's case."

2169. SENTNEY v. OVERTON, 4 Bibb. 445.

That if a witness state that he conceives himself to be interested, he is to be rejected, though in fact he be not so.

Oppo. Williams v. Matthews, 3 Cowen, 252; Henry v. Morgan, 2 Binn. 497; Baldwin v. West, Hard. R. 50; Reid's Lessee v. Dodson, 1 Tenn. R. 396; Homan v. Thompson, 6 Car. & P. 717.

2170. SERGEANT v. PITKIN, C. C. Apl. 1819, cited in 3 Conn. 526.

S. P. as in Melan v. Duke de Fitz James.

Denied in Woodbridge v. Wright, 3 Conn. 526.

2171. SERLESTED'S CASE, Latch. 202.

"Ld. Ellenborough. The reasoning in that case seems to prove too much; for it goes the length of shewing that obtaining money under a threat of any thing, however improbable, would be indictable at common law." 6 East, 139.

2172. SETON v. SLADE, 7 Ves. Jr. 278. Per Ld. Eldon, C.

Overruled. Vid. Growsock v. Smith, (ante.)

2173. SEWALL v. FITCH, 8 Cowen, 215; Groves v. Buck, 3 M. & S. 178.

Seems to be within the principle of Clayton v. Andrews, (ante).

2174. SEYMOUR v. BROWN, 19 John. R. 44.

Where wheat was delivered to a manufacturer to be exchanged for flour; and put into the common stock, and consumed by fire before the flour had been delivered; *Held*, that the property in the wheat was not changed and the loss was on the plaintiff.

Overruled in Ewing v. French, 1 Blackf. R. 353. See also Hard v. West, 752 and 756, n. (a.)

2175. SEYMOUR v. DELANCY, 6 J. Ch. R. 223 to 235.

Reversed in S. C. 3 Cowen, 445.

2176. SEYMOUR'S CASE, 10 Co. 95.

Affirmed; but *distinguished*. See 2 Burr. 711 to 716.

2177. SHALLCROSS v. FINDEN, 3 Ves. Jr. 739; Toller, 288; 1 Madd. Ch. 483, 4.

That a general clause in a will, directing all just debts to be paid will revive a debt barred by the statute of limitations.

Denied and overruled in *Peck* v. *Botsford*, 7 Conn. R. 176. Daggett, J.—"It is true such a doctrine is advanced by able judges; but in *Burke* v. *Jones*, 3 Ves. & Bea. 275, all the cases were reviewed and the V. Ch. there held, that a devise of real and personal estate for the payment of just debts, did not revive a debt barred by the statute, before the testator's death. So, in Smith v. Porter, 1 Binn. 209, and in Roosevelt v. Mark, 6 J. Ch. R. 266. 293.—I entertain no doubt that the evidence arising from the clause in this will is insufficient for this purpose.

2178. SHAPLAND v. SMITH, 1 Bro. C. C. 75.

Lord Eldon deplored the rule adopted by Lord Thurlow. See Magennis v. Fallon, 2 Moll. Ch. R. 580.

2179. SHARPE v. GAMON, 2 Vern. 32.

Overruled. Calv. on Part. in Eq. 202.

2180. SHAW v. COATES, at the Sittings before Ld. Kenyon, mentioned in Selwyn's N. P. 320, n. 25.

Denied in Chanoine v. Fowler, 3 Wend. 173: *Held*, that notice of the non-acceptance of a bill of exchange cannot be given by a stranger.

2181. SHAW v. LINDSEY, 18 Ves. 496; Scott v. Hough, 4 Bro. C. C. 213; Nichols v. Gwyn, 1 Sim. 389.

Denied in Johnson Pet., Nagle Res., 1 Moll. 244.—"These cases were misreported."

2182. SHEE v. CLARK, 12 East, 507.

Doubted in Minett v. Forrester, 4 Taunt. 541; Goldschmidt v. Lyon, ib. 534; Parker v. Smith, 16 East, 382. See also Koster v. Eason, 2 M. & S. 112, and Holt's N. P. 91, n. *et seq.*

2183. SHEEHY v. MANDERVILLE et al., 6 Cranch, 253.

'That as the first suit was brought only against J., it could not be correctly said, that the contract is carried into judgment as respects M.; that the doctrine of merger could be applied only to a case in which the original declaration was on a joint covenant, not to a case in which the declaration in the first suit was on a sole contract.'

Denied in Robertson v. Smith, 18 John. 459—Spencer, C. J.—See Fairchild v. Holly, 10 Conn. 474.

2184. SHEFFIELD v. WATSON, 3 Caines R. 69.

Spencer, J. in Walker v. Swartwout, 12 John. R. 448, 9.—"I confess, the train of the judge's reasoning in Sheffield v. Watson, does not appear to me perfectly reconcilable with the declaration, which, I am fully convinced, is correct, that we did not intend to shake any of the *English* authorities."

2185. SHELLEY'S CASE, 1 Co. 104.

'Anderson's severe censure of Coke's report of Shelly's case is in print, and well known.' Sug. on Pow. p. 24. (No. 18.)—Abolished in 1 R. S. 725, s. 28. (New-York.)

2186. SHELLY'S CASE, 1 Salk. R. 296—Holt.

In strictness no funeral expenses are allowable against a creditor except for the coffin, ringing the bell, parson, clerk, bearers, &c., but not for pall or ornaments.

Overruled in Hancock v. Podmore, 1 B. & Adol. 260; Edwards v. Edwards, 4 Tyrw. Ex. R. 438, the expenses must be reasonable, according to the circumstances of each particular case, with reference to the testator's condition in life.

2187. SHELTON v. COCKE, 3 Mumf. 191; 6 ib. 191.

The acknowledgment of a partner after the dissolution of the partnership, was held not proper evidence of the existence of the debt, so as to charge the other partners.

Oppo. Cady v. Shepherd, 11 Pick. 407, *et seq.*; Wood et al. v. Braddick, 1 Taunt. 103.

2188. SHEPHERD v. LITTLE, 14 John. R. 210.

Ch. J. Spencer says "parol evidence of a consideration of a different nature from that expressed in a deed of conveyance" is not admissible; yet it is admissible to show that it has not been paid.

Denied in M'Crea v. Purmort, 16 Wend. R. 470, *et seq.*:—Held, that parol evidence was admissible to prove that the consideration was *iron*, though the consideration expressed was *money paid*.

2189. SHEP. TOUCHST, p. 274.

Where it is said if a man lease to A. for 80 years if he so long live; but if he die within the 80 years, remainder over, that this remainder is void, &c.

Denied in Wright v. Cartwright, 1 Burr. 282.

2190. SHEP. TOUCHST., 214; Perk. s. 209.

To deliver seisin or make livery, the feoffor, if it be a house, the manner is to take the ring, latch, or hasp of the door, (all the people, men, women and children, being out of the house,) or if it be a piece of ground, do take a clod of the ground, or a bough or a twig of a tree or bush growing thereupon, and (*all the people being out of the ground,*) the same ring, &c.

Overruled in Doe d. Reed v. Taylor, 5 B. & Ad. 575: Held, that livery of seisin is not rendered void by the fact of a child having remained on the premises at the time, even though such child were the descendant of a party having title, unless the child was placed there for the purpose of representing that party.

2191. SHERBORN v. COLEBACK, 2 Ventr. 175.

Overruled. 1 Lutw. 180; Whitgrave v. Chauncy; Smith v. Airey, 6 Mod. 128; Walker v. Walker, 12 Mod. 258.

2192. SHERIFF OF ESSEX' CASE, Hob. 202.

Overruled. James v. Pierce, 1 Vent. 269; Lenthal v. Lenthal, 2 Lev. 109.

2193. SHERIFF v. POTTS, 5 Esp. 96.

Overruled. Emmerson v. Heelis, 2 Taunt. 38; Raine v. Bell, 9 East, 195; Laroche v. Oswyn, 12 East, 131; Cormack v. Gladstone, 11 East, 347; Urquhart v. Barnard, 1 Taunt. 450; Vid. Tappenden v. Randall, (post).

2194. SHERWOOD v. SALMON, 2 Day's R. 128.

That no actionable fraud can be committed by false affirmations respecting the quality of lands, because the quality is open to occular observation.

Overruled in Sherwood v. Salmon, 5 Day, 439.

2195. SHIPBROOK, (LD.) v. LD. HINCHINBROOK, 11 Ves. 257.

As to sending back a report for objections extrinsic.

Denied in Kilbee v. Sneyd, 2 Moll. 241.

2196. SHIRLEY v. DAVIS, cited, 6 Ves. 678.

That and other cases of that class, not to be followed. Magennis v. Fallon, 2 Moll. Ch. R. 589.

2197. SHOCK v. M'CHESNEY, 2 Yeates, 473.

Overruled in S. C. 4 Yeates, 507;—Yeates, J.—" We were misled by the authority in 2 Term, 231, and the cases in 1 Salk. 21; 2 Salk.

456, that malicious prosecution will not lie, where an indictment has been found and a *nolle prosequi* entered."

2198. SHOVEL v. EVANS, Lutw. 35.

Denied in Waterbury v. Mather, 16 Wend. 613.—Cowen.

2199. SHORT v. PRATT, 6 Mass. 496.

The second award in this case, made by two only of the referees, was a complete reversal of the former award, and in favor of a different party; which reconciles this case with May v. Haven, 9 Mass. 325, which, otherwise, would seem to contradict it.

2200. SHRIDER v. NARGAN, 1 Dall. 68.

Overruled in 1 Wash. C. C. R. 204, Hylton v. Brown.

2201. SHRUNK v. THE PRESIDENT, &c. OF THE S. NAVIGATION CO., 14 S. & R. 71.

The fisheries in the rivers, as well as in the sea, whether the tide ebbs and flows there or not, is common to all the citizens.

Decided differently in Commonwealth v. Chapin, 5 Pick. 201; The People v. Platt, 17 J. R. 195, and Hooker v. Cummins, 20 J. R. 90.

2202. SHUTT v. PROCTOR, 2 Marsh. R. 227.

Doubted and shaken in Overseers of St. Martin v. Warren, 1 Barn. & Ald. 491, and Coles v. Gowen, 6 East, 110. adhered to.

2203. SHUTTLEWORTH v. STEPHENS, 1 Camp. 408.

An indorser has been admitted, upon a bill drawn for his accommodation, to prove for the plaintiff that the plaintiff gave him value for it.

Overruled in Edmonds v. Lowe, 8 B. C. 407. See also Bagnall v. Andrews, 7 Bing. 217; Jones v. Brooke, 4 Taunt. 464. See Birt v. Kershaw, (ante).

2204. SIDERFIN'S REPORTS.

Ld. Holt, Comb. 377:—'Many good cases are spoiled in Siderfin.' '2 Siderfin, which book, by Dolben, J. is fit to burned.' 1 Show. 252—In 2 Ventr. 243, Siderfin is called a 'young reporter.'

2205. SIGNORET v. NOGUIRE, 2 Ld. Raym. 1241.

S. P. as in Bacon v. Waller, (ante).

2206. SIMEON v. BAZETT, 2 M. & Selw. 94.

Overruled it seems in Bazett v. Meyer, survivor of Simeon, 5 Taunt. 824: Held, that a neutral insuring against all risks until safely warehoused in the warehouse of the consignee, an adventure in furtherance of the objects of British Commerce is protected by the policy against

confiscation by the act of his own government under the Berlin and Milan decrees.

2207. SIMMONS v. WILMOT, 3 Esp. R. 91—Eldon.

If a person takes care of a casual *pauper*, and for whom the parish officers would be liable to provide, he has a right to recover his expences of them.

Overruled in Atkins v. Barnwell, 2 East, 505; Dunbar v. Williams, 10 John. R. 249; Everts v. Adams, 12 ib. 352. See Lamb v. Bunce, 4 M. & S. 275.

2208. SIMON v. MOTIVOS, 1 Bl. 599.

The judges intimated an opinion that sales at auction were not within the statute of frauds.

Overruled in Kenworthy v. Schofield, 2 B. & C. 945; Davis v. Rowell, 2 Pick. 64, as to the sale of goods; and in Walker v. Constable, 1 B. & P. 306, as to the sale of lands.

2209. SIMONDS v. HODGSON, 6 Bing. 50.

Instruments of bottomry—what constitutes.

Reversed in 3 B. & Adol. 50, S. C.

2210. SIMPSON v. GRIFFEN, 9 John. R. 131.

Held, that the payee, indorser of a note, who has been sued by the indorsee in default of the maker, cannot compel the maker to pay the costs of such suit.

Doubted in Wynn v. Brooke et al., 5 Rawle's R. 108, 9—Rogers: It 'carries the law to a greater extent than it has been perhaps in England, and certainly further than in Pennsylvania.'

2211. SIMPSON v. GUTTERIDGE, 1 Mad. 609.

Contrary to Mansfield's case, cited by Mr. Hargrave, note 8. Co. Litt. 33. a. Although that case is by an unknown hand, the adoption of it by Mr. Hargrave, makes it an authority. Power v. Sheil, 1 Moll. Ch. R. 312.

2212. SIMPSON *v.* HARTOPP, Willes, 512; (acc. 4 T. R. 568.)

Respecting the exemption of property from distress.

Explained. 1. Things annexed to the freehold, as fixtures, &c. See Smith's L. C. p. 192:—2. *Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ.* See ib.; Adams v. Grane, 3 Tyrwh. 326; 1 C. & M. 390; Brown v. Shevill, 2 Ad. & El. 138; Fenton v. Logan, 9 Bing. 676; Muspratt v. Gregory, 1 Mee. & W. 633.

2213. SIMSON v. HART, 1 J. Ch. 93.

[illegible] in 14 John. R. 63.

2214. SIMSON v. HART, 14 John. 63.

That insolvency does, or may constitute a sufficient equity to entitle a party, who is a creditor upon a joint judgment, to sett off that judgment against a separate judgment debt due by him to one of the joint judgment debtors, both of the latter being insolvent.

Doubted in Howe v. Sheppard, 2 Sum. R. 415, *et seq.* See Green v. Darling, 5 Mason, 145.

2215. SINCLAIR v. FRASER, cited in Duchess of Kingston's case, 11 St. Tr. by Harg. 222; 1 Doug 5. in n.; 1 Phil. Ev. 350, 351. 353, n.

That a judgment in a foreign court, is only *prima facie* evidence of a debt, and has the force of a simple contract between the parties.

Denied in Martin v. Nicholls, 3 Sim. 458 (5 Cond. Ch. R. 198). But see 2 K. C. p. 119, *et seq.*

2216. THE SISTERS, 5 Rob. 138—Ld. Stowell.

Held, that to transfer the title to a vessel it is necessary that it should be in writing.

Denied in Bixby v. Franklin, 8 Pick. 86; Lazarces v. Commonwealth Ins. Co., 5 ib. 76; M'Namara v. Franklin Ins. Co. 2 Hall, 1.

2217. THE SIX CARPENTERS' CASE, 8 Coke 290.

If a man abuse an authority given him by *the law* he becomes a trespasser *ab initio.—Contra* of an authority given by *the party.*—The abuse is good matter of replication.

Explained and limited in respect to the pleadings in Price v. Peek, 1 Bing. N. C. 380: (Crogate's Case, 8 Co. 66; Taylor v. Cole, 3 T. R. 292). The only proper course is to reply the abuse specially; for if the defendant plead an authority in law, and the plaintiff rely on an abuse, he must not reply *de injuria.* See the note to Crogate's Case, (in Smith's L. C. p. 55 *et seq*; also Monprivatt v. Smith, (ante.)

2218. SKELDING v. WARREN, 15 John. R. 275; Hubbly v. Brown, 16 John. R. 70.

The maker of a note is indifferent in an action by the indorsee against the indorser and may therefore be a witness.

Oppo. Pierce v. Butler, 14 Mass. 303.

2219. SKELTON v. HAWLING, 1 Wils. 258.

Not very intelligible as reported by Wilson: but is clearly stated in 1 Saund. 219. d. Williams' ed. note. Vid. 3 East, 4.

2220. SKILLINGER v. BOLT, 1 Conn. R. 147.

S. P. as in The Trust. of Lansingburgh v. Willard, (post).

2221. SKILLINGTON v. NORTON, 1 Freem. 412; 3 Keb. 422; 2 Lev. 142, S. C.

Overruled. Stokelane v. Doulting, Fortescue, 219; Clifton v. Churchman, Andr. 314.

2222. SKINNER v. DAYTON, 5 J. Ch. R. 351. 359.

Reversed in 19 John. R. 513.

2223. SKINNER v. WHITE, 2 J. Ch. R. 526.

Reversed in 17 John. R. 357.

2224. SLEE v. BLOOM, 5 J. Ch. R. 379. 381.

Reversed in 19 J. R. 456. 474. (6 Cow. 26).

2225. SLINGERLAND v. MORSE, 8 Jon. 474 and Coit & al., v. Houston, 3 J. Cas. 242; 1 Root 55 & 443.

Denied in Weld v. Hadley, 1 N. H. R. 329—Richardson, J., so far as an opinion is intimated that property may pass upon a tender and refusal.

2226. SLOCUM v. THE UNITED INS. CO., 1 J. Cas. 151.

S. P. as in Mumford v. Church, (ante).

2227. SMALLCROMB v. BUCKINGHAM, 5 Mod. 376; 1 Ld. Raym. 251.

Doubted in Giles v. Grover, 1 Clark & Fin. 99.

2228. SMITH v. BANCHER, 2 Str. 993; 2 Barnard, 331; Cunn. 89. 127: *Cas. temp.* Hardwicke, 62; 2 Kelyn. pl. 123.

Explained in Savacool v. Boughton, 5 Wend. 173.

2229. SMITH v. CLARKE, 1 Esp. 180; Peake's C. 225.

Ld. Kenyon held, that where a payee of a bill had made an indorsement in blank thereon, no subsequent indorsee could restrain its negotiability by a special indorsement.

Overruled in Sigourney v. Lloyd, 8 B. & C. 622.

2230. SMITH v. CLAY, Amb. 645.

"Much more fully reported in Brown, in the note to Ld. Deloraine v. Brown, than in Ambler" Ld. Alvanley, 2 Ves. Jun. 272.—"Of which there is an imperfect account in Ambler, but is well reported, from the notes of the learned judge himself, in 3 B. C. C. 639, n. Per Ch. Brougham, Rus. & M. 453—4 Cond. R. 524. See 2 Sch. & Lef. 631; 1 Chit. Gen. Pr. 780: n. (m).

2231. SMITH v. DE SILVA, Cowp. 469.

Lord Tenterden, C. J. (8 B. & C. 612) :—"The case of Smith v. De Silva, Cowp. 469, is a very entangled case, and the facts stated in the report are not very clear or perspicuous."

2232. SMITH v. DOVERS, Doug. 427.

Plea of usury; and held that the plaintiff may traverse the corrupt agreement and conclude with a verification.

Said per Lawrence, J. to have been overruled. Charles v. Marsden, 1 Taunt. 224.

2233. SMITH v. GIBSON, *Cas. temp. Hardw.* 319.

"There are several cases where a recovery in one action shall be a bar to another action of the same nature, but that is where the recovery is a satisfaction for the very thing demanded by the second action. In an action of trover the plaintiff recovers damages for the thing, and it is a sale of the thing to the defendant and it vests the property in him, and therefore it is a bar to an action of trespass for the same thing."

Denied in Curtis v. Groat, 6 John. 168; Osterhout v. Roberts, 8 Cowen, 43; Sanderson v. Caldwell, 2 Aik. 203; Jones v. M'Neil, 2 Bail. R. 466. *Sed* Carlise v. Burley, 3 Greenl. R. 250; Floyd v. Brown, 1 Rawle, 121; Marsh v. Pier, 4 ib. 273; Morrell v. Johnson, 1 H. & M. 449, uphold Smith v. Gibson, *supra.*

2234. SMITH v. JOHNSTON, 1 Penn. R. 471.

Except by devise, the crop does not pass as parcel of the land.

Oppo. Spencer, J. in Foote v. Colvin, 3 John. R. 216; Kittridge v. Woods, 3 N. H. R. 503; Crews v. Pendleton, 1 Leigh's R. 297. See Johnson v. Smith, 3 Penn. 501.

2235. SMITH v. KENDAL, 1 Esp. R. 231; 6 T. R. 123.

Although a note is not negotiable, still it is entitled to days of grace.

Oppo. Backus v. Danforth, 10 Conn. R. 297.

2236. SMITH v. LUSHER, (or LASHER) 5 Cowen, 688.

The legal effect of a negotiable note given by a partnership firm to a partner and by him indorsed. It seems to have been decided on the ground, of the law peculiar to negotiable paper, which would enable an indorsee to come upon partnership effects of an insolvent Company, having the same priority as other partnership creditors.

Doubted in Portland Bank v. Hyde et. al., 2 Fairf. R. 197. 201, 202.

2237. SMITH v. M'DONALD, 3 Esp. R. 7.

Ld. Kenyon said, "that if the evidence offered to the jury by a pro-

secutor, on the trial of an indictment; be sufficient to cause them to pause, he should hold it to be a probable cause."

Denied in Willans v. Taylor, 3 Mo. & P. 350—Park.

2238. SMITH'S EX'RS. v. MILLER, 14 Wend. 190.

Reversed in Miller v. Smith's Ex'rs., 16 Wend. 425: *Held*, 1. that after a lapse of 20 years, the presumption of payment will arise at common law in respect to a judgment; 2. In debt on judgment and plea of *payment*, it may be shown after a great lapse of time, that execution is sued on the judgment; that there was property to satisfy it; that the officer had deceased without making any return of the execution; and from such evidence a jury may find for defendant.

2239. SMITH v. PARKER, 2 W. Bl. R. 1230.

Denied by Ld. Thurlow, Ld. Alvanley, and Sir Thos. Plummer, 1 Bro. C. C. 246; 3 B. & P. 650; Jacob, 219.

2240. SMITH v. PLUMER, 1 B. & Ald. 575.

Held, that the master of a vessel has no lien on the freight for his advances abroad on account of the ship.

Oppo. Gardner v. The ship New Jersey, 1 Pet. C. C. R. 227; Ship Packet, 3 Mason, 255; Lane v. Penniman, 4 Mass. 92; 11 ib. 72 and 415. In Ingersoll v. Van Bokelin, 7 Cow. 670; 5 Wend. 314, S. C.; and the last case, though it recognized the right of the master to a lien on the freight for *repairs*, supplies and other *necessary expenses* incurred *abroad*; yet it was held, that he had no lien on the freight for his wages; reversing the judgment of the supreme court as to the lien for wages. "It is entirely clear that the master's wages are a personal charge on the owner, and give no claim on the ship." Per Hopkinson, J. in 1 Gilp. R. 1.

2241. SMITH v. SHARP, 1 Salk. 139; 5 Mod. 133; 12 Mod. 86, S. C.

Overruled. Gyse v. Ellis, 1 Str. 228; 11 Mod. 313, Leach's ed. S. C.; Mayor of London v. Tench, 7 Mod. 173; Challoner v. Davis, 1 Lutw. 570.

2242. SMITH v. SHAW, 12 J. R. 257.

Doubted in Savacool v. Boughton, 5 Wend. 176.

2243. SMITH v. SMITH, Str. 955.

Gibbs, C. J. in 7 Taunt. 231 said—"Smith v. Smith is a very confused case."

2244. SMITH v SURRIDGE, 4 Esp. 26.

That the sentence of a court of Admiralty sitting, under a commis-

sion from a billigerent, in a *neutral* country, is binding, *if acquiesced in by the government of the neutral country.*

Overruled in Havelock v. Rockwood, 8 D. & E. 276, and is contrary to the case of the Flad. Oyen, 1 Rob. Rep. 144. Vid. Donaldson v. Thompson, 1 Camp. 429.

2245. SMITH'S CASE, Tr. 8 Jac. 1. 2 Rol. Abr. 685.

That the borrower is an incompetent witness on a penal information against the usurer.

Overruled in Abrahams v. Bunn, 4 Burr. 2253. Vid. Commonwealth v. Frost, 5 Mass. 53.

2246. SNEE v. PRESCOTT, 1 Atk. 245.

——" miserably reported in the printed book." Said per Buller, J. 6 East, 29, (note); where there is a better statement of the same case.

2247. SNELLING v. HUNTINGFIELD, 1 C. M. & Ros. 26, note (c).

(Doubting, if not overruling Collins v. Price, 5 Bing. 132; 2 M. & P. 232.)

2248. SNIPES v. SHERIFF OF CHARLESTON, 1 Bay. R. 395; and Greenwood v. Naylor, 1 M'Cord, 414.

Are founded on the principle, that there is an older judgment entitled to the money, to which the sheriff may properly pay it, and to which he is bound to pay it; and if the money be made by the sale of land, the rule has been so extended that the money must be paid over to the oldest judgment though no execution has been lodged.

Oppo. to the English rule; and in Mitchell v. Anderson, 1 Hill R. 69. Those "decisions cannot apply when the sheriff is forbidden to enforce the elder execution."

2249. SOAMES v. LONERGAN, 2 B. & C. 564.

Oppo. Deffell v. Brocklebank, 4 Price, 36.

2250. SORRELL v. CARPENTER, 2 P. Wms. 483.

Dictum of King, C. overruled in Worsley v. E. of Scarborough, 3 Atk. 392.

2251. SOULLE v. GERRARD, Cro. Eliz. 525.

In respect to the dictum about the estate tail.

Denied in Dallam v. Dallam's Lessee, 7 Har. & J. 245, 6.

2252. SOUTH v. SNELLING, 7 Monroe's R. 421.

S. P. as in Moore v. Wilson, (ante).

Overruled in Wells v. Bowling's heirs, 2 Dana's R. 41.

2253. SOUTHCOTE'S CASE, 4 Rep. 83 b.; Cro. Eliz. 815.

The position that to *keep*, and to *keep safely*, are one and the same thing.

Denied in Coggs v. Bernard, 2 Ld. Raym. 911, n.; 1 Com. R. 133; Foster v. The Essex Bank, 17 Mass. 479; Sto. on Bailm. 50, *et seq.*

2254. SOUTHERLAND v. PURRY, 2 Penns. R. 145, and Smith v. Webster, 2 Watts, 478.

Reconciled in Brown v. Metz, 5 Watts, 167 and 169.

2255. SOUTHERLAND v. SHEFFIELD, 2 Wen. 293.

The proceedings were set aside on payment of cost, it was said that the defendant was not bound to pay the costs until they were taxed; the plaintiff demanding a sum in gross, and *refusing* to give a bill of items.

Explained in Hoadley v. Cuyler, 10 Wen. R. 593. "It always was the practice of the Supreme Court, that a party relieved on paying costs, must seek his adversary and pay the costs within 20 days after the entry of the rule."

2256. SPADER v. DAVIS, 5 J. Ch. R. 280; 20 John. R. 554, S. C.

S. P. as in Bayard v. Hoffman, (ante).

2257. SPALDING v. MOORE, 6 D. & E. 363.

Overruled in Richards v. Heether, 1 Barn. & Ald. 29.

2258. SPARKES v. BELL, 8 B. & C. 1.

Doubted in Dixon v. Yates, 5 B. & Ad. 313: Held, that to a declaration against husband and wife, for a debt due from the wife before coverture, the husband's discharge under the insolvent act is a good plea. In Lockwood v. Salter, 2 Nev. & M. 255—Patteson:—"With respect to thecase of Sparkes v. Bell, I think if Miles v. Williams et ux., (1 P. Wms. 249) had been more considered, the decision would have been different."

2259. SPARKS v. GARRIGUES, 1 Binn. R. 153.

Overruled in Longstreth v. Gray. 1 Watts' R. 60.

2260. SPARROW v. CARRUTHERS, 2 Str. 1236.

That if the owner of goods insured takes them out of the ship into his own lighter, the underwriters are discharged. Doubted in Hurry v. Roy. Exch. Assur., Marshall on Ins., 167.

2261. SPENCER v. SMITH, 3 Camp. 9.

Overruled in Scot v. Gilmore, 3 Taunt. 226.

2262. SPENCER v. SOUTHWICK, 10 John. R. 259.

Reversed in S. C., 11 John. R. 573.

2263. SPENCER'S CASE, 5 Rep. 16 (a.)

Better stated in Keppell v. Bailey, 2 M. & K. 517, *et seq.* The subject of covenants which run with the land considered upon a bill filed by the shareholders of a rail-road to enforce a covenant against a person who had purchased certain works, with notice of the partnership deed; Held, first, that the covenant did not run with the land so as to bind assignees at law; and that a court of equity would not, by holding the conscience of the purchaser to be affected by the notice, give the covenant a more extended operation than the law allowed to it. The Lord Chancellor saying—"There was no unity of title in the estates of the contracting parties, &c.—they were not held by them severally under the same landlord; but what is of more importance, inasmuch as it is by no means clear that even the kinds of privity I have mentioned would suffice, the parties did not stand in relation of lessor and lessee towards each other; and there is, therefore, no reversionary interest now in the covenantees to which the right claimed against the assignees of the covenantors may be annexed; and those assignees are called upon to perform the covenant solely in respect to the estate which they have purchased, and, in respect of persons who, except under that covenant, have no connection whatever with the estate. It is the case of mere strangers; it is a covenant by the owner of a messuage and land with the owner of a neighboring lime work and rail-road, that he and his executors and assigns, will always use that lime work and rail-road, for making iron at, and carrying it from, such messuage." See a learned note upon this subject in Smith's L. Cas. p. 27 *et seq.* and see Norman v. Wells, 17 Wend. 27.

2264. SPONG v. SPONG, 1 Y. & J. Exc. R. 300.

Reversed on appeal to the House of Lords. See 3 Y. & J.—*Mem. at the beginning.*

2265. SPRAGG v. HAMMOND, 3 Bro. & B. 59.

S. P. as in Andrew v. Hancock, (ante.)

2266. SPRAGUE v. BIRDSALL, 2 Cowen, 419.

Explained in Cayuga Br. Co. v. Stout, 7 Cowen, 33.

2267. SPRATLEY v. WILSON, 1 Holt's N. P. R. 226.

Gibbs, C. J.—held it sufficient to constitute a good *donatio mortis causa*, where a person *in extremis* said "I have left my watch at Mr. R.'s at C. C., fetch it away, and I will make you a present of it."

Denied in Bunn v. Markham, 7 Taunt. 224. [226,—Gibbs said, "that what he had there, somewhat improvidently thrown out could not be maintained."

2268. SPRINGWELL v. ALLEYN, Alleyn, 91.

S. P. as in Dale's case, (ante).

2269. SQUIB v. HOLE, 2 Mod. 30; 1 Freem. 193.

That an officer is not chargeable for an escape, if the cause of action arose out of the jurisdiction of the Court by whose process the person was taken.

Overruled in Higginson v. Sheif, 1 Com. R. 153. Vid. 3 Com. Dig. 335; 1 Salk. 201.

2270. STAATS v. TEN EYCK, 3 Caines, 111.

That in an action on a covenant of quiet enjoyment forever, the measure of damages is the consideration money and interest.

Not law in Connecticut: Vid. Kirb. Rep. 3. Nor in Massachusetts. Gore v. Brazier, 3 Mass. 523; also 2 Mass. 433; 4 Mass. 108.

2271. STAFFORD v. ROFF, 7 Cowen, 179.

Reversed in 9 ib. 626 (in error); and affirming, that an infant who had sold his horse while under guardianship—(there being no proof of a delivery, but vendee having offered to sell the horse) might maintain trover before coming of age without demanding the horse.

2272. STANFILL v. HICKES, 1 Ld. Raym. 280. decided in 1697; also reported in 2 Salk. 413.

Denied in Birch v. Wright, 1 T. R. 380 by Mr. J. Buller, who says that 'Stanfill & Hicks and Bellasis v. Burbrick, therein referred to, were short, loose notes, jumbled together with notes, and not to be relied on.' (acc. Nelson, J. 13 Wend. 482).

2273. LD. STANHOPE'S CASE, 6 Ves. Jr. 678.

A man had articled for the purchase of an estate tithe free, but which afterwards appeared to be subject to tithes.

Ld. Thurlow decreed a specific performance, although the purchaser proved that his object was to buy an estate tithe-free.

Overruled. See Sug. on Vend. 295, *et seq.* (9 Lond. ed).

2274. STANSFIELD v. JOHNSON, 1 Esp. 101; STILL v. WARDEL, 2 Esp. 610.

Overruled. Vide Sheriff v. Potts, (ante.)

2275. STAPLES v. STAPLES, 4 Greenl. 532.

"Until after demand made, the attorney is not liable to the action of his principal.

Overruled in Coffin v. Coffin, 7 Greenl. 298. Mellen, C. J. saying:

—"The expression was incidental, and not necessary, and had no connexion with the point decided."

2276. STAPLETON v. CONWAY, 1 Ves. 48.

Denied in Aylmer v. Aylmer, 1 Moll. 88.

2277. STAR CHAMBER CASES, (Chase's Trial, 182.)

Mr. L. Martin when citing Hob. 294, said:—"It is true this case was determined in the Star Chamber, but being for the *accused*, it becomes a higher authority."

2278. STARK. EV. 144.

The declining to answer a question respecting a conviction for crime, will raise an impression against the witness. Ld. Ellenborough, (2 Peak. N. P. C. 222,) said the witness "was not thereby at all discredited." S. P. 1 Ry. & Mo. R. 382.

2279. 1 STARK. EV. 194.

A copy is never admissible when the original is produced.

Exception in Burdon v. Rickets, 2 Camp. 121, n. If a copy of any document which itself is not evidence at common law, be made evidence by act of parliament, a copy must be produced; the original in such case in not evidence.

2280. 2 STARK. EV. 427, citing Enfield v. Hills, Sir T. Jones, 116; 2 Lev. 236.

It is sufficient if the witness release his right to the corporation.

Overruled in Doe v. Tooth, 3 Y. & J. 19: Held, that a member of a corporation is not a competent witness to sustain the claim of the corporation though he release his interest in the subject matter of the suit.

2281. STARK. EV. 461. (460.) (6th Am. ed.)

'The colloquium and other averments, which connect the words or libel with the plaintiff or subject matter before stated, must next be proved. This is usually done by the testimony of one or more witnesses who know the parties and circumstances, and who state their opinion and judgment as to the *intention* of the defendant to apply his words or libel to the parties or circumstances as alleged.

Denied in Gibson v. Williams, 4 Wend. R. 320.

2282. 2 STARK. EV. 6 Am. Ed. 572.

Evidence is admissible to prove that a deed was executed, or a bill of exchange made, at a time different from the date.

Denied by Martin, J. in Kenner et al., v. Their Creditors, 8 Lou. R. 40.

N. S.—"on examination we find that they (the cases cited) support the position, in regard to deeds only."

2283. 2 STARK. EV. 859.—See 2 Phil. Ev. 63.

'If the landlord evict the tenant from parcel of the premises let at an entire rent, the latter, if he quit the residue, is discharged from the whole rent; (Smith v. Raleigh, 2 Camp. 515) but if he continue in possession of the remainder he is liable *pro tanto*. (Stokes v. Cooper, 3 Camp. 514, n).

Denied in Briggs v. Hall, 4 Leigh R. 484, as not supported by the cases cited; and "the better opinion" is said by high authority to be in favor of the doctrine of Briggs v. Hall, 3 K. C. 470; But see the observations of Jackson, J. in Fitchburg Cot. M. Co. v. Melvin, 15 Mass. 268. 270.

2284. 3 STARK. EV. 1757.

"In all cases, where the credit of a witness has been attacked, whether by general evidence, or by particular questions upon cross-examination, *it seems*, that the party who called him, is at liberty to support his character, by general evidence of good character."

Doubted. See Rogers v. Moore, 10 Conn. R. 13.

2285. STARR ET AL. v. JACKSON, 11 Mass. R. 519.

Establishing the principle that trespass *quare clausum fregit* lies for the owner of land in the possession of his tenant at will, where the injury affects the permanent value of the property.

Explained in Little v. Palister, 5 Greenl. R. 15, *et seq.*

2286. STATE BANK v. ALLEN, 2 Hawks R. 1.

Overruled in Gov. for use of State Bank v. Twitt et al., 1 Dever. R. 153, as to the point that the return of a sheriff is only *prima facie* evidence against his sureties.

2287. STATE v. CANDLER, 3 Hawks, 393.

That a witness convicted in another state of the crime of forgery was incompetent as a witness.

Oppo. in Commonwealth v. Green 17 Mass. 514; ——— v. Knapp, 9 Pick. 497.

2288. THE STATE v. J. N. B., 1 Tyler, 36.

Overruled in State v. Phelps, 2 Tyler, 374.

2289. THE STATE v. M'KEE, 1 Bail. 653, 654.

Reviewed in The State v. M'Lemore, 2 Hill, 680; and the points decided stated more definitely.

2290. STATE v. MORRIS, 3 Hawks, 388.

Denied by Daniel, J.; but approved by Henderson & Ruffin, in State v. Lipsey, 3 Dev. R. 485.

2291. THE STATE v. RAWLS, 2 Nott & M'Cord, 334.

As to the admission of *original entries* or *memoranda* and *copies* or *extracts* to aid a witness' memory.

Qualified and explained in Merrill v. Ithaca, &c. R. R. Co. 16 Wend. 595 to 600—Cowen.

2292. STATE v. RIDGLEY, 2 H. & M'H. 120; CLARKE'S LESSEE v. HALL, ib. 378.

Held, that one convicted of an infamous crime in another jurisdiction, is incompetent to be a witness here.

Oppo. Commonwealth v. Green, 17 Mass. R. 514.

2293. STATE v. ROSWELL, 6 Conn. R. 446.

In a prosecution for incest, an actual marriage must be proved; the confession of defendant is not admissible to prove that fact.

Doubted. See Crayford's case, Greenl. 57. See Ros. Cr. Ev. p. 229.

2294. THE STATE v. SPARROW, 3 Murphy, 487.

Though the witnesses were ordered out of court pending the examination; yet one remaining by design may be examined.

Oppo. Rex v. Wylde, 6 Car. & P. 380.—Parke, J. "I always, in a criminal case, reject a witness remaining in court after all the witnesses on both sides have been ordered out."

2295. STATE v. TWITTY, 2 Hawks, 441—1 Pet. R. 352.

That the printed statute book of another state, was not admissible to prove the statute of such state.

Overruled in Taylor v. Bank of Illinois, 7 Mon. R. 576; Raynham v. Canton, 3 Pick. 293; Whart. Dig. p. 280, 281.

2296. STEARNS ON REAL ACTIONS, 92. 94. 200.

By the practice in Massachusetts special attachments are made in real actions for the purpose of securing costs in case of recovery.

Denied by Mellen, Ch. J. (in 7 Greenl. 234.)

2297. STEEDE v. BERRIER, Freem. R. p. 292. (C. 343.) (ed. 1826), in C. B.

Reversed in S. C. Freem. p. 477, in B. R. (C. 655,) on error. See Pollexfen, S. C.; 8 Vin. 163.

2298. STEELE v. ADAMS, 1 Greenl. 1; Emery v. Chase, 5 Greenl. 232, and 6 ib. 364; Dixon v. Swiggett, 1 Har. & J. 252; Brocket v. Foscue, 1 Ruffin, 54; 1 Hawks, 64, S. C.; Spiers v. Clay, 4 Hawks, 22; Graves v. Carter, 2 Hawks, 576.

That an acknowledgment of the consideration money in a deed is conclusive.

Oppo. Pritchard v. Brown, 4 N. H. R. 397, and S. P. in p. 229; Wilkinson v. Scott, 17 Mass. 249; Shephard v. Little, 14 John. R. 210; Bowen v. Bell, 20 John. R. 338; Jordon v. Cooper, 3 S. & R. 564. 570. 355; Hutchinson's Adm. v. Sinclair, 7 Mon. R. 291; Gully v. Grubbs, 1 J. J. Marsh. 388. 390.

2299. STEELE v. WRIGHT, cited 1 T. R. 708.

Questioned and overruled in Hare v. Grove, 3 Anstr. 687; and Holtzapffel v. Baker, 18 Vez. 115.

2300. STEELVE v. WRIGHT, cited in Doe v. Sandham, 1 T. R. 708.

S. P. as in Brown v. Quilter, (ante).

2301. STEHLEY v. HARPER, 5 S. & R. 544.

Overruled, it seems, in Thompson v. Gifford, 12 S. & R. 74.

2302. STEIGLITZ v. EGGINTON, 1 Holt's N. P. R. 141.

Gibbs :—" One man cannot authorise another to execute a deed for him but by deed. No subsequent acknowledgment will do.

Denied in Cady v. Sheppard, 11 Pick. 406, *et seq.*; Seaton v. Bunker, 1 Hall, 262.

2303. STENT v. BAYLIS, 2 P. Wms. 217.

Denied in Revell v. Hussey, 2 Ball & Bea. 287, as to a dictum of Sir J. Jekill.

2304. STERRET'S CASE, 1 Dall. R. 356.

Doubted, it is said by the reporter (in 4 Dall. note (1),) though never expressly overruled.

2305. STEVENSON v. WATSON, 1 Bos. & Pul. 365.

Overruled in Hewett v. Bellott, 2 B. & Ald. 745; See Sheriff v. Gresley, 5 N. & M. 491. That an attorney cannot commence an action for costs after an order to tax his bill, until the taxation is completed or the order is waived.

2306. STEWART v. THE COMMONWEALTH, 4 Serg. & Rawle, 195.

That in the indictment for stealing notes, it was necessary to aver that the same were " due and unpaid."

Denied in M'Laughlin v. The Commonwealth, 4 Rawle, 484.

2307. STEWART v. DUNLOP, 4 Bro. P. C. 483.

Thompson, J. in 12 Wheat. 415, says, that this case, "is very imperfectly reported, the reasons of the judgment, and the ground on which the decision rested, not appearing in any report of the case." See the observations of Story, J. in 4 Mason, 77.

2308. STICKLE v. PEARSON.

Cited in Thompson v. Stent, 1 Taunt. 322. as having been wrongly decided.

2309. STILEMAN v. ASHDOWN, 2 Atk. 477.

Courts of Equity have long been endeavoring to free themselves from rules which clash with the substantial end of justice, the satisfaction of debts, and they have accordingly got rid of Ld. Hardwicke's doctrine, in Stileman v. Ashdown, as savoring too much of technicality. Leahy v. Dancer, 1 Mol. Ch. R. 319. 322, 323.

2310. STILES v. RAWLINS, 5 Esp. N. P. C. 133.

That if the declaration professes to describe the writ; any omission was fatal, however immaterial the words might be.

Denied in Cousins v. Brown, Ry. & Moo. 291, by Best, C. J. who said, 'it was shaken, if not overruled in a recent case.'

2311. STITT v. WARDELL, Park on Ins. 388, 6 ed.

Doubted in Urquhart v. Barnard, 1 Taunt. 450.

2312. STOKES v. CARNE *et al.*, 2 Camp. 339.

That the register of a ship, obtained upon the oath of one of the defendants, was *prima facie* evidence against all of them.

Overruled in Tinkler v. Walpole, 14 East, 226; See 2 Conn. 233. Gould, J.

2313. STOKES v. COOPER, cited in a note to Smith v. Raleigh, 3 Camp. 514;

Denied in Reeve v. Bird, 1 Cromp. M. & Ros. 36—Parke, B:—"That decision is at variance with the older authorities."

2314. STOKES v. MOORE, 1 Cox. 219.

Defendant wrote instructions for a lease to the plaintiff, in these words: viz. "The lease renewed; Mrs. Stokes to pay the King's tax; also to pay Moore £24 a year, half-yearly, &c.; Mrs. Stokes to keep the house in good tenantable repair, &c." Stokes the lessee filed a bill for a specific performance, and the Court of Excheq. held it not to be a sufficient signing to take the agreement out of the statute; although it was not necessary to decide the point.

Doubted by Lord Eldon. See 1 Sugd. on V. 102, (Am. ed. 119.) See also the observations of Dorsey, J. in 1 Maryland R. 149.

2315. STOMFIL v. HICKS, 2 Salk. 413, pl. 2; 1 Ld. Raym. 480.

Same point as in Anon. 2 Salk. 413, pl. 4 ante. Denied per Buller, J. in Birch v. Wright, 1 D. & E. 380.

2316. STONE v. LINGWOOD, 1 Str. 651.

Held by Ld. Mansfield in Green v. Farmer, 4 Burr. 2218, not to be law.

2317. STONER v. GIBSON, Hob. 81. b.

If the defendant pleaded in bar to the plaintiff's action a plea which was good, and the plaintiff demurred to it, and the defendant pending the demurrer, pleaded another matter, *puis darrein continuance*, which is decided against him, either on demurrer, or on trial, still he would be entitled to the benefit of his first plea, because it being a good bar to the plaintiff's action, and standing confessed by him on the record, he cannot have a judgment in his favor against his own confession.

Doubted in Staple v. Heydon, 6 Mod. 7, by Powell, J., in Martin v. Wyvill, Stra. 493; Eyre, J. who cited Moore, 871, S. C. which is contrary to Hobart, pl. 1210, it was there resolved that a plea *puis darrein continuance* could not be pleaded after demurrer; Bauer v. Roth, 4 Rawle, 52, Kennedy, J.

2318. STORRS v. WETMORE, Kirby, 203.

S. P. as in Moore v. Hathaway.
Starr v. Tracy, 2 Root, 528.
S. P. as in Moore v. Hathaway.

2319. 1 STORY'S EQ. JUR. p. 475, 497, citing Primrose v. Bromley, 1 Atk. 89.

"If one of the *sureties* dies, the remedy at law lies only against the surviving *parties*; but in equity it may be enforced against the representative of the deceased *party*, and he may be compelled to contribute to the surviving *surety*, who shall pay the whole debt."

Doubted in Kennedy v. Carpenter, 1 Whar. R. 364.

2320. STOUFFER v. COLEMAN, 1 Yeates, 393.

Doubted in Kauffelt v. Bower, 7 Serg. & R. 75, by Gibson, J:— "I can hardly believe that the case of Stouffer v. Coleman, 1 Yeates, 393, the first of the two in the order of time, is accurately reported."

2321. STOVER v. DUREN, 2 M'Cord, 266.

Denied in Walker v. Briggs, 1 Hill's R. 127; Crenshaw v. Wetsel, 2 ib. 419; "The case of Creyton and Sloan v. Dickerson, 3 M'Cord, 348, (held) that a payment by a prisoner in execution, to be such an one as would deprive him of the benefit of the act, must be an un-

due preference to the prejudice of the plaintiff. This construction is I think perfectly correct, notwithstanding what is said to the contrary in the case of Stover v. Duren, 2 M'Cord, 266."

2322. STOWE v. WARD et al., 1 Hawks, 604.

Overruled in Stowe v. Ward et al., 1 Dever. R. 67, as to the order of division, *per capita* instead of *per stirpes*.

2323. STOWE'S CASE, Cro. Jac. 603.

Overruled. Rex v. Everard, 1 Ld. Raym. 638; Holt, 173; 1 Salk. 195, S. C.

2324. STRANGFORD v. GREEN, 2 Mod. 228; Kyd on A.; Watson on P.

That the case of submission to arbitration is an exception to the general principle, that one partner can bind another to strangers by a writing not sealed.

Denied in Southard et al. v. Steel, 3 Mon. R 436, 7, 8; Gow on Part. 483; Taylor et al. v. Coryell et al., 12 S. & R. 249, 250.

2325. STRELLEY v. WINSON, 1 Vernon, 298, n. a.

Oppo. Anonymous, Skinner, 230; Woolrych on Com. Law, 31, n. y. says—"It seems that the case of Strelly v. Winson, is the same with that at Skinner, 230, and that the report in Skinner is the more accurate, which declares that upon an *express prohibition* of the voyage, the dissenting owner will not be entitled to profit, nor be liable to loss."

The ground of this decision is said to be misstated; the true ground being that the part owner who complained had not *expressly* dissented. See Horn v. Gilpin, Amb. 255; Abbot on Shipping, 87, note (m).

2326. STRICKLAND v. CROKER, 2 Ca. in Ch. 211.

A male infant is bound by a marriage settlement.

Doubted in Milner v. Ld. Harewood, 18 Ves. 259.

2327. STRIKE v. BATES, 1 Lev. 207, 208; 1 Sid. 326.

That by *proper county* in Stat. 16 and 17 Car. 2, cap. 8, is intended the county where the issue *arises*.

Ouerruled in Craft v. Boite, 1 Saund. 246, Vid. n. 3, and the cases there cited.

2328. STRINGFELLOW'S CASE, Dyer, 67 b.

Decides in principle that until the creditor obtains a consummate right, the crown's rights are not ousted.

The authority of that case though doubted for a time, cannot now be disputed. It was recognized as good law by Hobart, (in Sheffield v. Ratcliffe, Hob. 339;) by Ld. Hardwicke and the two Ch. Justices, Ry-

der and Willes, (in Rex v. Cotton, Parker, 112;) and by the courts of C. B. and K. B. in Uppom v. Sumner, (post,) and Rorke v. Dayrell, (ante).

2329. STRONG v. FERGUSON, 14 John. 161.

In debt on arbitration bond, where a power to award costs was not included in the submission, the arbitrators awarded costs; and the Court also allowed the same.

Overruled in Gordon v. Tucker et al., 6 Greenl. 254. "The arbitrators cannot award the costs of reference, unless power be expressly given them for that purpose."

2330. STRONG v. SMITH, 3 Caines' R. 160; S. P. Tucker v. Ladd, 7 Cowen, 450.

It was held that a traverse may be taken to any number of facts if all are necessary to make one point.

Overruled in Tubbs v. Caswell, 8 Wend, 130; Satterlee v. Sterling, 8 Cowen, 233. See O'Brien v. Saxon, 2 B. & C. 908; Selby v. Bardons, 3 B. & Ad. 9; Robinson v. Raley, 1 Burr. 316, and the note to the last case (in Smith's L. Cas. p. 247, 8.); Vivian v. Jenkin, 3 Ad. & El. 741.

2331. STUART v. CLOSE, 1 Wend. R. 438.

Reversed in Close v. Stuart, 4 Wend. R. 95:—*Held*, that if the money is collected on an erroneous judgment; and such judgment is reversed in defect of form merely and costs are awarded to the original defendant; the latter cannot plead the payment made on the erroneous judgment in bar of a second suit. Also, that the court in *dernier resort* on reversal of the judgment of the supreme court, rendered on a judgment of the common pleas, will render such judgment as the supreme court ought to have rendered.

2332. STURT v. BLANDFORD, 4 Esp. 16. (cited).

S. P. as in Windham (Lord) v. Wycombe, (post).

2333. STURTEVANT v. BALLARD, 9 John. R. 337.

That a voluntary sale of chattels with an agreement in the instrument, that the vendor was to retain the possession for a stipulated time is fraudulent as to creditors.

Overruled in Bissell v. Hopkins, 3 Cowen, 166. But see Divver v. M'Laughlin, 2 Wend. 596; Collins v. Brush, 9 Wend. 198. See also 2 R. S. p. 136, s. 5, 6, 7; Cunningham v. Freeborn, 11 Wend. 240; 2 K. C. 528, *et seq.*

2334. STYMETS v. BROOKS, 10 Wend. R. 206.

Land sold on an execution sued out after the death of the defendant, but *tested* as on the day *previous* to his death, passed no title.

Denied in Warder v. Tainter, 4 Watts, 283, 284:—" It appears to be contrary to the English law, as well in respect to taking lands in execution there, as goods." It may be sustained perhaps, by the statute law on the subject.

2335. SUMNER v. BRADY, 1 H. Bl. 630.

Overruled in Rushton v. Chapman, 2 Bos. & Pul. 340.

2336. SURTEES v. HUBBARD, 4 Esp. 203.

When a party indebted to another consents to pay over the amount to a third person, the latter can maintain assumpsit for it.

Denied, it seems, in Owings v. Owings, 1 Maryland R. 484, citing Com. Dig. 309, (note p. by Mr. Hammond). But see Fairlie v. Denton, 8 B. & C. 395; Price v. Easton, 4 B. & Ad. 433.

2337. SOUTHERLAND v. BRUSH, 7 J. Ch. 17.

Ch. Kent, it would seem, adopts without qualification the doctrine of Nugent v. Gifford, (ante,)—Whale v. Booth, (post)—viz.—that the executor has the absolute property in the assets and could transfer them at pleasure to his own benefit.

Denied, if not overruled, in Colt v. Lasnier, 9 Cowen, 320.

2338. SUTLIFF v. FORGEY, 1 Cowen, 89; 5 ib. 713.

Denied in Priest v. Cummings, 16 Wend. 616, in respect to the marginal note.

2339. SUTTON v. NELSON, 10 S. & R. 238.

" In Sutton v. Nelson"— the word 'filing' was carefully used for delivering, on the supposition that one would follow the other as a matter of course." White v. Willard, 1 Watts, 42. See also 9 Bing. 46. A paper is said 'to be filed when it reaches its place of final custody.'

2340. SUYDAM et al. v. KEYES, 13 John. R. 444.

That the officer must see that he acts within the scope of the legal powers of those who commanded him.

Overruled in Savycool v. Boughton, 5 Wend. 170.

2341. SWAN v. SOWELL, 3 B. & Ald. 759—Bayley.

If a party admits the debt, and does not say that it is satisfied, or refuses to pay it, alleging at the time an insufficient excuse for not paying it, the law will, in these cases, raise an implied promise to pay the debt then acknowledged to be due.

Denied in Wetzell v. Bussard, 11 Wheat. R. 312 *et seq.*—Marshall, C. J.

2342. SWAINE v. PERINE, 5 J. Ch. R. 492; Hale v. James, ib. 258.

In favor of the widow's right to profits against the alienee, from the death of the husband.

Denied in Tod v. Baylor, 4 Leigh's R. 517—Tucker.

2343. SWAYN v. STEPHENS, Cro. Car. 245. 333.

Doubted in Philpott v. Kelley, 3 Adol. & El. 106; where Patteson, J. observes:—"A case of Swayn v. Stephens, Cro. Car. 245. 333, was cited by my brother Coleridge, in which, although the defendant had actually sold the ship for which the action was brought, more than six years before, the court presumed, in favor of the plaintiff, (who had been unable to sue the defendant, by reason of his remaining abroad,) that the ship had come to the defendant's hands a second time, and been converted anew. That decision was against the opinion of one of the Judges, and savors of subtlety; if such a question arose now, I should doubt if it would be decided in the same manner."

2344. SWASEY v. ADMINISTRATORS of VANDERHEYDEN, 10 John. R. 33.

A negotiable note given by an infant even for necessaries, is void.

Overruled in Goodsell v. Myers, 3 Wend. R. 478; Dubose v. Wheddon, 4 M'Cord, 221; Sed see Goodsell v. Myers, (ante).

2345. SWETT et al. v. BOARDMAN, 1 Mass. R. 258.

A publication of a will was necessary to give validity to the will.

Overruled by Ld. Ch. Gibbs, (7 Taunt. 361;) Ray v. Walton, 2 Marsh. (Ky.) R. 73.

2346. SWEET v. HORN, 1 N. H. R. 332.

That a tender of the money secured by mortgage, discharged the land, so that a writ of entry may be maintained where the tender had been refused, in favor of the mortgagor, without bringing the money tendered into court.

Denied in Bailey v. Metcalf, 6 N. H. R. 156.

2347. SWIFT v. CLARK, 15 Mass. R. 173.

S. P. as in Hooper v. Perley, (ante).

Denied in Bronde v. Haven, 1 Gilpin, 606.

2348. SYLER v. ECKART, 1 Binn. 378.

Explained in Eckert v. Eckert, 3 Penn. 362—Kennedy.

2349. TALBOT v. BRADDILL, 1 Vern. 183, 394.

Denied by Daggett, J. in 7 Conn. R. 384. "It is too bald to insist, that the obligor, by his own act, may discharge the contract before it is due."

2350. TALLMADGE v. LYON, 2 J. Ch. R. 56.

Reversed in 14 John. R. 501.

2351. TALLMADGE v. RICHMOND, 9 John. R. 85.

Reversed in Richmond v. Tallmadge, 16 John. R. 307 : Held, that to an action of escape, a plea of voluntary return by the prisoner within the liberties, before suit brought, and that plea found by the jury to be true in fact, is a valid defence.

2352. TAPPEN v. KAIN, 12 John. R. 120.

The truth or falsity of the *plene administravit* must be determine by the inventory only.

Overruled in Willoughby v. M'Cluer, 2 Wend. 608.

2353. TAPPENDEN v. RANDALL, 2 B. & P. 472.

That no interest can be recovered, in an action for money had and received.

Denied in Wood v. Robbins, 11 Mass. 504 ; Vid. also Pease v. Barber, 3 Caines, 266 ; Emmerson v. Heelis, 2 Taunt. 38 ; Raine v. Bell, 9 East, 195 ; Laroche v. Oswyn, 12 East, 131 ; Cormack v. Gladstone, 11 East, 347 ; Urquhart v. Barnard, 1 Taunt. 450. See 2 Sug. on Vend. Ch. 10. (9 Lond. Ed.)

2354. TASSEL v. LEWIS, 1 Ld. Raym. 743.

" 3. If the indorsee of a bill accepts but two pence from the acceptor, he can never after resort to the drawer."

Overruled in Walwyn v. St. Quintin, 1 B. & P. 652 ; But see Cory v. Scott, 3 Barn. & Ald. 619.

2355. TATE v. AUSTIN, 1 P. Wms. 264 ; 2 Vern. 689.

Overruled it seems in Aguilar v. Aguilar, 5 Madd. R. 414 ; Held, that if the wife's separate estate be pledged for the debt of her husband, she is entitled to all the rights and remedies of a *personal surety*. See also Gahn v. Niemcewicz, 11 Wend. R. 312.

2356. TAWNEY v. CROWTHER, 3 Bro. Ch. Ca. 161. 318.

An agreement respecting lands was prepared in writing and kept by Deft. who refused to sign it, but afterwards wrote a letter alluding to it, which Ld. Thurlow thought was tantamount to signing, and decreed for the Plf.

Ld. Redesdale says this case is not accurately reported, and that he could never bring his mind to agree with Ld. Thurlow's decision. Clinan v. Cooke, 1 Sch. & Lefr. 34. See Sug. on Vend. 93, 94. (7 Lond. ed.) " But in these cases there must be a clear reference to the

particular paper, so as to prevent the possibility of one paper being substituted for another." See Tanner v. Smart, 6 B. & C. 603; See 16 Wend. 28.

2357. TAYLOR v. COLE, 3 Term R. 295; 2 Phil. Ev. 304.

By the modern practice, the sheriff delivers only legal possession; and the creditor, to obtain actual possession, must proceed by ejectment.

Denied in Rogers v. Pitcher, 6 Taunt. 207—Gibbs, C. J.—"There is no case, in which a party may maintain an ejectment, in which he cannot enter." See the observations of Ch. J. Parsons, in 3 Mass. R. 218.

2358. TAYLOR v. HIGGINS, 3 East, 169.

Giving a bond by the plaintiff, in satisfaction of a former bond signed by himself and the defendant, and as his surety, was not to be considered as payment in respect to the defendant.

Decided differently by Ld. Kenyon, in Barclay et al. v. Gouch, 2 Esp. 547; acc. 9 Mass. 553; 4 Pick. 444; 11 John. 516, and 6 Greenl. 333.

2359. TAYLOR v. HORDE, 1 Burr. R. 60.

The effect of a conveyance by ancient feoffment.

Doubted by Preston on Abstracts, 2 V. 390 et seq.; but approved in Doe v. Lynes, 3 B. & C. 388.

2360. TAYLOR v. JONES, 2 Atk. 600.

S. P. as in Bayard v. Hoffman, (ante).

Overruled in England and in Kentucky. See Doyle v. Sleeper, 1 Dana's R. 535.

2361. TAYLOR v. STIBBERT, 2 Ves. Jr. 437.

Doubted as to one point in Crofton v. Ormsby, 2 Sch. & Lef. 582. 599.

2362. TAYLOR v. WILLIAMS, 2 B. & Adol. 845, 857.

Qualified in Venefra v. Johnson, 6 Car. & P. 53; Mitchell v. Jenkins, 5 B. & Adol. 588.

2363. *TELLICOTE'S CASE*, 2 Stark. 484.

Doubted in Roscoe Cr. Ev. p. 46. (Am. ed.)—"It seems difficult to maintain the decision in *Tellicote's case*."

2364. TEMPLAR v. M'LACHLIN, 2 New R. 136; PASSMORE v. BIRNIE, 2 Stark. R. 5; 2 Phil. Ev. p. 72.

Doubted in 2 Phill. Ev. p. 72, n. (6).

2365. TERRY v. DUNTZE, 2 Hen. Bl. 380.

Overruled in Watchman et al. v. Crook et al., 5 Gill & J. 239; Vid. 8 Mass. R. 80; 10 John. 203. See Sears v. Fowle, ante.

2366. TEYNHAM, DEM. OF, v. TYLER, 4 M. & P. 377.

Doubted in Crease v. Barrett, 1 C. M. & Ros. 932, 3.

2367. THACKARA v. CURREN, 2 Browne, 246.

Doubted in Rodrigue v. Curcier, 15 S. & R. 83.

2368. THALHIMER v. BRINKERHOFF, 20 John. R. 386.

Reversed in S. C., 3 Cowen, 623.

2369. LORD THANET v. PATTERSON, K. B. East. 12 G. 2, cited in Bull. N. P. 235.

'If a party wants to avail himself of the decree only and not of the answer or depositions, the decree being under the seal of the court and enrolled, may be given in evidence without producing the bill and answer, and the opposite party will be at liberty to shew that the point in issue there was not *ad idem* with the present issue.

Doubted in Gres. on Ev. 110; 1 Phil. Ev. 392, 3.

2370. THAYER v. SHERMAN, 12 Mass. 441; STAPLES v. STAPLES, 4 Greenl. 532.

Denied (in 5 N. H. R. 520.)

2371. THELLUSON v. SMITH, 2 Wheat. 396.

Explained in Conrad v. The Atlantic Ins. Co., 1 Pet. R. 387. 451, where Mr. J. Johnson says—"I have never acknowledged its authority in my circuit, on the point supposed to be decided by it; viz. the precedence of the debt of the U. States as to a previous judgment, in the case of a general assignment."

2372. THERESA v. BONITA, 4 Rob. Ad. R. 236.

S. P. as in Artaxa v. Smallpiece, (ante).

2373. THOMAS v. DENING, 3 Har. & J. R. 242; and BULKLEY v. LANDON, 3 Conn. R. 76.

The plaintiff having assigned his interest to another may yet impair that interest by confessions made by him to the prejudice of his assignee.

Oppo. Frear v. Evertson, 20 John. R. 142. *But* if "you derive title under this party, what he says is evidence against you." Haddam v. Mills, 4 C. & P. 486. "Declarations respecting the subject matter of a cause, by a person who, at the time of making them, had the same

interest in such matter as one of the parties now has, are admissible in evidence against that party." Woolway v. Rowe, 1 Ad. & El. 114.

2374. THOMAS v. THOMAS, 6 D. & E. 671.

The doctrine laid down by Lawrence, J. that the intent of the devisor was to be collected from what passed at the time of making the will;—examined and restricted in its application. Jackson v. Sill, 11 John. 219.

2375. THOMAS v. THOMPSON, 2 John. R. 471.

S. P. as in Toller's Tr. on Executors, &c. (post).

2376. THOMPSON v. BOND, 1 Camp. 4.

Ld. Ellenborough says "If I represent that I have an order from A., when I have no such order, and so induce a person to deal with me on the credit of A., I am not principally liable as for a debt of my own."

Overruled in Hill v. Perrott, 3 Taunt. R. 274.

2377. THOMPSON v. BUTTON, 14 John. R. 84.

Thompson, C. J.—"That as a general proposition, it is undoubtedly true, that goods taken in execution are in custody of the law, and cannot be taken out of such custody, when the officer has found them in and taken them out of the possession of the defendant in the execution."

Limited and applied in Clark v. Skinner, 20 John. R. 467, and Dunham v. Wyckoff, 3 Wend. R. 280.

2378. THOMPSON v. DOUGHERTY, 12 S. & R. 448.

That a trustee by deed for the benefit of creditors, may not avoid a previous fraudulent assignment.

Overruled in Englebert v. Blanjot, 2 Whar. R. 240.

2379. THOMPSON v. FAUSSATT, Pet. C. C. R. 182.

S. P. as in The Cynthia, (ante).

Overruled in Bronde et al. v. Haven, 1 Gilpin, 592. 604.

2380. THOMPSON v. LEACH, 3 Mod. 296. 301; Carth. 211. 435.

That a surrender by an infant or an idiot is void *ab initio*.

Denied in Zouch v. Parsons, 3 Burr. 1794.

2381. THOMPSON v. MILES, 1 Esp. R. 184.

Ld. Kenyon held, that in an action for not performing an agreement, in respect to land, the title deeds must be exhibited, but that the proof of their execution, except of the one under which the plaintiff immediately claimed, was unnecessary.

Overruled in Crosby v. Percy, 1 Camp. 303, where Mansfield, C. J.

held, that the vendor of the residue of a term, being the third or fourth assignee, was bound to prove the mesne assignments.

2382. THOMPSON v. MACERONI, 3 B. & C. 1.

Doubted in Smith's Com. of M. L. 299, n. (v); See Elliot v. Pybus, 10 Bing. 512.—"The report of the case is an extremely meagre one."

2383. THOMOND, (Earl of) v. Earl of SUFFOLK, 1 P. Wms. 464; 2 ib. 165; ib. 331; 3 ib. 385.

A distinction between a compulsory and voluntary payment in respect to a legacy.

Overruled in Ashburner v. Macquire, 2 Bro. C. C. 110; Innes v. Johnson, 4 Ves. 574.

2384. THORNE v. PITT, Select Cas. temp. King C. 54.

Overruled in White v. Hayward, 2 Ves. 461, by Ld. Hardwicke, and in Lowter v. The Mayor, &c. of Colchester, 2 Merivale R. 113.

2385. THORNTON v. DIXON, 3 Bro. Ch. R. 199; (S. P. 7 Ves. 425; 9 ib. 500).

Was a question between the heirs and distributees, and Ld. Thurlow, held that the nature of the agreement between the partners in that particular case was not sufficient to vary the nature of the property; and, therefore, that after the dissolution of the co-partnership the property would result, according to its respective nature, the real as real, and the personal as personal estate.

Overruled in England, in Crawshay v. Maule, 1 Swanst. R. 508. 523. 527; Leckrig v. Davies, 2 Dow. R. 242; Mr. J. Story, (Hoxie v. Car et al., 1 Sumner R. 184.); "It has been repeatedly denied by Ld. Eldon, who has held the opposite doctrine, that real estate purchased on the partnership account ought, on the death of one of the partners, to be held to be personal estate." (See also Yeatman v. Woods, 6 Yerg. 20; 3 K. C. 14.)

2386. THORNTON v. WINN, 12 Wh. 183.

Denied in Hyatt v. Boyle, 5 Gill & J. 111.

2387. THOROUGHGOOD'S CASE, Noy, 73.

A. having a judgment in debt and execution against B., who died, and the sheriff levied the money upon the executors of B., it was held by the court to be "nought." The editor of Dyer's R. 76 b., in giving a statement of this case in a marginal note, substitutes the term "void" for "nought."

Overruled by the cases cited by Kennedy, J. in Speer v. Sample, 4 Watts, 369. 374: where it was also said, that the substitution of the term *void* for *nought* was unwarranted.

2388. THORP, J. in 22 Ass. pl. 67.

That trespass does not lie against a corporation aggregate, for a *capias* and *exigent* do not lie against it.

Doubted by Parsons, Ch. J. (7 Mass. 186); "That a capias and exigent do not lie against a corporation is evident; but that no action of trespass lies, is questionable."

2389. THRUSH v. ROOKE, 1 Esp. R. ——.

S. P. as in Cuff v. Penn, (ante).

2390. THYNNE v. RIGBY, Cro. Jac. 314.

Award that the defendant should give security to plaintiff for payment of £16. at two days, held void for the uncertainty what security he should give, whether by bond or otherwise.

"Though much weight is due to the authority of Croke, probably if the case reported there were a new case, it would be decided otherwise." Simmons v. Swaine, 1 Taunt. 549.

2391. TIDD'S PRACTICE, *6th ed.* p. 908.

In a joint action against several defendants, and one suffers judgment by default the plaintiff cannot be nonsuited as to one of them only.

Denied in Murphy v. Donlan, & al., 5 B. & C. 178, where it was held, that after a judgment by default against one defendant,—the plaintiff may upon the trial of an issue joined by the other defendant, elect to be nonsuited; and Holroyd said, "the rule has certainly been as laid down in Tidd's Practice, but it is not founded upon any principle."

2392. TILLOTSON v. CHEETHAM, 2 John. R. 248.

Reversed in Cheetham v. Tillotson, 5 John. R. 430.

2393. TIMBERLAKE v. GRAVES, and Gresham v. Greshams, 6 Munf. R. 174. 187.

Denied in Griffith v. Thomson, 1 Leigh's R. 321.

2394. TIMROD v. SHOOLBRED, 1 Bay, 319.

That selling for a sound price, raises in law a warranty of the thing sold; and that this warranty extends even to faults *unknown* to the seller.

Contrary to Pickering v. Dowson, 4 Taunt. 779; Emerson v. Brigham, 10 Mass. 197; Vid. also 3 Day's Esp. 116, note 2, and authorities there cited. See Jones v. Bright, 5 Bing. 533; Gray v. Cox, 4 B. & C. 115, and the observations in 2 K. C. 478.

2395. TIMS v. PORTER, Hayw. R. 234. 275.

A gift of a chattel to a person with a reservation to the donor, is good; and vests a property in the event of his surviving the donor.

Doubted. See 2 K. C. 438, *et seq.* In Royston v. Hankey, 3 Moore & Scott, 381, it was held, that declarations by an intestate, that he meant that a person with whom he resided should have his furniture and effects for what he owed her, were sufficient to entitle such person to take, and retain possession of the property.

2396. TINDAL v. BROWN, 1 Term, 167.

That notice of the dishonor of a bill must come from the holder.

Overruled in Jameson v. Swinton, 2 Camp. 375; Bray v. Hadwen, 5 M. & S. 71; held, that any party to the instrument may give it.

2397. TIPPING v. SMITH, 2 Stra. 1024.

That an award that all manner of proceedings, if any, depending at law, should be no farther prosecuted, is bad, because not final.

Denied by Kent, J. in Purdy v. Delavan, 1 Caines, 304; Vid. also Kyd on Awards, 211; Simmons v. Swaine, 1 Taunt. 549.

2398. TISSARD v. WARCUP, 2 Mod. 280, 1st point.

Overruled. Smith v. Barrow, 2 D. & E. 476; Hyat v. Hare, Comb. 383; Ditchburne v. Spracklin, 5 Esp. 32; Spalding v. Mure, 6 D. & E. 365; Blackwell v. Ashton, Sty. 50; Aleyn, 21, S. C. acc.

2399. TITCHBURNE v. WHITE, 1 Str. 145.

Contradicted in Gibbon v. Paynton, 4 Burr. 2298.

2400. TITTENSON v. PEAT, 3 Atk. 529.

Arbitrators are not bound to give notice of the time they intend to meet, or the particular place where.

Overruled. Rigden v. Martin, 6 Har. & J. 403.

2401. TOBEY v. WEBSTER, 3 Johnson, 468.

That lessor cannot maintain trespass, *qu. cl.* for a wrong done while his tenant was in actual possession of the land.

The contrary is holden in Starr v. Jackson, 11 Mass. 519.

2402. TODD v. GEE, 17 Ves. 273.

Overruling Greenaway v. Adams, 12 Ves. 395. (See No. 1014, ante.)

2403. TOLLER'S EXECUTORS, &c.

The appointment, and even nomination, of a debtor, an executor, operates a release and an extinguishment of the debt.

Denied in Bacon v. Fairman, 6 Conn. 128; Stevens v. Gaylord, 11 Mass. 256; S. P. 12 ib. 199.

2404. TOLLER'S LAW OF EXECUTORS, 396.

A legacy given by a debtor to his creditor, which is equal to, or greater than the debt, shall be considered as a satisfaction of it.

In Clarke v. Bogardus, 12 Wend. 68—Savage, Ch. J. said:—" The exceptions to the rule are numerous; and the rule should be stated thus; ' that a legacy shall not be deemed a satisfaction of a pre-existing debt, unless it appears to have been the intention of the testator that it should so operate.' "

2405. TOLPUTT v. WELLS, 1 M. & S. 395.

Overruled in Prince v. Nicholson, 5 Taunt. 333. 665, and in Lawrence v. Bush, 3 Wend. 305. 307,—" So far as the case in M. & S. is an authority against allowing an executor to plead *puis darrein continuance,* a judgment recovered after he had pleaded the general issue."

2406. TOMKINS v. BARNETT, 1 Salk. 22.

That money paid on a usurious contract cannot be recovered back. Lord Mansfield said this had been denied a thousand times. Clark v. Shee, Cowp. 199; Vid. also Doug. 697; 2 Burr. 1065; 1 D. & E. 286.

2407. TOMPKINS v. ASHBY, 22 Com. Law R. 239; S. C. 1 Mo. & M. 32.

Two gross errors of misprint occur in the Phila. ed. viz.—In the margin—" A demurrer or plea"—should read ' A demurrer *to* plea'—And the Ch. Justice is made to say (p. 240)—" the demurrer was to be taken"—It should read—' the demurrer was *not* to be taken'—See the Eng. ed. 1 Mo. & M. 32.

2408. TOMSON v. TRAFFORD, Popham, 9.

Denied in Lyn v. Wyn, O. Bridgman R. p. 142, and note (q).

2409. TOOK v. GLASCOCK, 1 Saund. 260.

Tenant in tail conveys by bargain and sale to another and his heirs, &c.: Held, that the grantee has only an estate descendible for life of tenant in tail.

But in Machell v. Clerk, 1 Com. Rep. 119, it was held that the grantee has a base fee simple, determinable by entry of the issue in tail, &c. agreeably to 3 Rep. 84 b.; Vid. also 7 Mod. 18; 2 Salk. 619.

2410. TOTHILL'S REPORTS.

" Little reliance is to be placed upon the loose notes by Tothill." Ch. Kent, 4 J. Ch. R. 559.

2411. TOUSSAINT v. MARTINNANT, 2 T. R. 100, and MARTIN v. COURT, ib. 640.

That a penalty was provable under a commission of bankruptcy, although the party had not actually made any payment.

Overruled in Young v. Taylor, 8 Taunt. 321, and *cases cited.*

2412. TOUTENG v. HUBBARD, 3 Bos. & Pul. 291.

Overruled in Flindt v. Scott, 5 Taunt. 674, and Baret v. Meyer, 5 Taunt. 824.

2413. TOWERS v. OSBORNE, 1 Str. 506.

Same point as in Clayton v. Andrews, (ante).

2414. TOWNE v. LADY GRESLEY, 3 C. & P. 581.

An apothecary may either charge for his attendance or for the medicines he sends, but he cannot be allowed to charge for both.

Oppo. Handey v. Henson, 4 C. & P. 110: Held, that a surgeon and apothecary may, besides his charges for medicine, recover reasonable charges for attention.

2415. TOWNSEND v. BUSH, 1 Conn. R. 160.

The maker of a note is a competent witness to impeach it, negotiable in its inception, and by him negotiated.

Denied in Newell v. Wright, 8 Conn. R. 319.—Daggett.—'This testimony is now inadmissible in Massachusetts, New-York and Pennsylvania, and was not admissible in our courts until the case of Townsend v. Bush."

2416. TOWNSEND v. ROWE, 2 Sid. 109.

Overruled. Dodswell v. Nott, 2 Vern. 317; Atto. Gen. v. Wyburg, 1 P. W. 599; Burton v. Hinde, 5 D. & E. 174; City of London v. Unfree Merchants, 2 Show. 146.

2417. TOWNSEND v. WINDHAM, 2 Ves. 10.

Where Ld. Hardwicke is made to say "If there is a voluntary conveyance of real estate, &c. by one not indebted, &c.—it will be good."

Per Ld. Mansfield,—"I rather doubt Ld. Hardwicke's saying that." Chapman v. Emery, Cowp. 280.

2418. TRACY v. HARKINS, 1 Binn. 345, note (d).

Words laid in the *second* person are substantially proved by evidence of words spoken in the third person.

Overruled in M'Connell v. M'Coy, 7 S. & R. 223.

2419. TRAFFORD v. BOEHM, 3 Atk. 446.

Doubted (in Sug. on Pow. 538 n. (b).)—'Ld. Hardwicke's doctrine has been questioned.'

2420. TRAVIS v. WATERS, 1 J. Ch. R. 48.

Reversed in 12 John. R. 500. S. C.

2421. TREADWELL v. UNION INS. CO., 6 Cowen, 270.

Insurance on a cargo of wheat at and from North Carolina to New-York; *held*, that if the vessel was sea-worthy when she passed the boundary line of that state, it was sufficient.

Doubted in 3 K. C. 306, n. (d).—'giving too narrow a construction to the words *at and from*.'

2422. TRECOTHICK v. EDWIN, 1 Stark. R. 468.

If the direction as to the place of payment at the foot of the bill be *printed*, it is part of the note.

Overruled in Williams v. Waring, 10 B. & C. 2.

2423. TREMENHERE v. TRESILLIAN, 1 Sid. 452.

That the sale of a ship by the master does not convey the property to the buyer, although the sale was made in a foreign country, in a case of inevitable danger and necessity.

Doubted in Abbott on Shipping, p. 2; and in effect overruled in Idle v. The Royal Exchange Assu. Co., 8 Taunt. 770. See 17 Mass. 478; 18 Johns. 208.

2424. TREVILIAN v. PYNE, 1 Salk. 107.

That in trespass to real property, where defendant justifies as bailiff, &c. the defendant's authority is not traversable. Overruled in Chambers v. Donaldson, 11 East, 66.

2425. TRUEMAN v. FENTON, Cowp. 548.

Ld. Mansfield—"I am ready to account, but nothing is due to you," —and much slighter acknowledgments will take a case out of the statute.

Denied in Perly v. Little, 3 Greenl. 97.

2426. TRUEMAN'S CASE, reported in East's Cr. Law, 470; 3 Stark. Ev. 1185, 6.

That confessions are admissable in evidence to prove the marriage in a prosecution for bigamy.

Denied in State v. Roswell, 6 Conn. R. 450. See 1 Phill. Ev. p. 410, note 782, (ed. 1838).

2427. TRUSCOTT v. CARPENTER, 1 Ld. Raym. 229.

That if the cause of action arose out of the jurisdiction of an inferior Court, defendant ought to plead it; and cannot afterwards shew it in any collateral action against the plaintiff or the officer executing the process.

Overruled in Moravia v. Sloper, Willes, 36.

2423. THE TRUSTEES OF LANSINGBURGH v. WILLARD, 8 J. R. 448: RICHARDSON'S EX. v. HUNT, 1 Mumf. 148.

A witness who declares on his *voire dire*, that he is interested in favor of the party calling him, and that interest is such as cannot be released, the witness ought not to be sworn, though in strictness he is not interested.

Overruled in Commercial Bank of Albany v. Hughes, 17 Wend. 94, and cases cited.

2429. THE TRUSTEES OF THE METHO. EPIS. CH. v. JAQUES, 3 J. Ch. R. 77.

Reversed in 17 J. R. 548.

2430. TUCKER v. IVES, 6 Cowen, 195.

Explained in Kimball v. Brown, 7 Wend. 325.

2431. TUCKER v. OXLEY, 5 Cranch, 34.

Doubted in M'Culloh v. Dashiell, 1 Maryland R. 106, 7.—Archer, J. "The case (Tucker v. Oxley) upon which the court there build their opinion, that a legal right universally exists in the joint creditors upon a separate commission to come on the separate estate *pari passu* with the separate creditors, is the case where a joint creditor is the petitioning creditor, and is an excepted case." Vide argument of Sir Samuel Romily in Ex parte Ackerman, 14 Ves. 604. See 1 Madd. 463.

2432. TURING v. JONES, 5 T. R. 402.

Overruled in Ashworth v. Ryall, 1 B. & Ald. 19, in respect to the dictum, that, upon general process, the plaintiff cannot declare in a particular character, as *qui tam* or in *auter droit*, &c. See 1 Dowl. Pr. R. 98, n. (a).

2433. TURNER v. EYLES, 3 Bos. & Pul. 456.

Held, that in an action for an escape out of *execution*, where the commitment is stated to be filed of record, this must be proved.

Denied in Cooper v. Jones, 2 M. & S. 202. This was said to be a mistake. See 5 East, 440; 2 B. Moore, 565.

2434. TURNOR v. FOLGATE, Raym. R. 70.

The creditor after having sued out and levied one execution, sued out a second execution on the same judgment, and levied it upon other goods with a view to double charge the debtor.

Denied in Pierson v. Gale, 8 Verm. R. 509. 514. See Luddington v. Peck, 2 Conn. 700.

2435. TURNER v. HULME, 4 Esp. 11.

The maker of an usurious note being arrested for the debt, procured

2446. UNION TURNPIKE CO. v. JENKINS, 1 Caines' R. 381.

Reversed in Jenkins v. Union Turnpike Co., 1 Caines' Ca. in Err. 86.

2447. UNITED STATES v. COOLIDGE, 1 Gall. 488.

Overruled in S. C. 1 Wheat. 415.

2448. U. STATES v. FRIES, 3 Dall. R. 515.

A new trial was granted in high treason.

Denied in U. States v. Gibert, 2 Sumner, 19. 48. *et seq.*

2449. U. STATES v. GRUNDY, 3 Cranch, 344.

In a civil action a man shall not be compelled to testify against his interest.

Denied in Bull v. Loveland, 10 Pick. 12.

2450. UNITED STATES v. JANUARY & PATTERSON, 7 Cranch, 572.

Doubted in Postmaster General v. Furber, 4 Mason, 333 :—Story, J. says—" It is indeed somewhat difficult, from the facts of the case, as reported, to give a very definite interpretation of the opinion of the court."

2451. UNITED STATES v. LACOSTE, 2 Mason, 129 ; Same v. Smith, 2 ib. 143.

Overruled in United States v. Gooding, 12 Wheat. R. 460, 478, as to one point.

2452. U. STATES v. LA VENGEANCE, 3 Dall. 297.

In favor of the extension of admiralty jurisdiction to a case for attempting to export arms to a foreign country.

Doubted in 1 K. C. 376 :—" and it may be doubted whether the case of the La Vengeance, on which all the subsequent decisions of the Supreme Court have rested, was sufficiently considered."

2453. UNITED STATES v. M'NEAL, 1 Gall. R. 387.

Held, that if the indictment charge the perjury to have been committed on a particular day at the circuit ; and the record shows a different day, the variance was fatal.

Oppo. Rex v. Coppard, 3 C. & P. 59 ; Ld. Tenterden, C. J.—They are not held to the day stated in the *nisi prius* record.

2454. UNITED STATES v. MORGAN, 3 Wash. R. 10.

If the bond " bind the obligors to do more than the law requires, it is not the bond which the officer was authorized to take, and all is void."

Denied in the United States v. Brown, 1 Gilpin's R. 155, 181—Hopkinson. He qualifies the principle "at least so far as it exceeds the requisitions of the law." The general common law principle being, that a bond taken at the common law, with a condition, in part good and in part bad, a recovery may be had on it for a breach of the good part. The same rule is established in regard to a statutory obligation, on a bond authorized and required to be taken by a statute, where there is nothing in the statute declaring that bonds, that vary from the prescribed form, shall be altogether void, and in which the good part of the condition may be easily separated from the bad.

2455. U. STATES v. NELSON & MYERS, 2 Brock. R. ——

In respect to the right to fill blanks in a bond after it has been executed by the sureties.

Oppo. Smith v. Crooker, 5 Mass. 538.

2456. U. STATES v. RAVARA, 2 Dall. 297.

In favor of the power of Congress to give jurisdiction to other Courts in cases in which the U. S. Sup. Court has original jurisdiction.

Doubted in Pennsylvania v. Kosloff, 1 Cranch, 137. See U. States v. Ortega, 11 Wheat. 467.

2457. U. STATES v. WILSON, 1 Baldw. R. 9.

A paper purporting to be a pardon granted by the governor of Maryland, under his signature and the great seal of the state, was admissible in evidence without further proof.

Overruled in Leland v. Wilkinson, 6 Pet. 317, *it is said*, by Mr. J. Baldwin in 1 Baldw. R. App. *sed quære.*

2458. UPPOM v. SUMNER, 2 Bl. 1251 & 1294.

S. P. as in Rorke v. Daryall, (ante).

Denied in Giles v. Grover, 6 Bligh's P. R. 299; 1 Clark & Fin. 84, S. C.; Thurston v. Mills, 16 East, 278, note; The King Sloper, 6 Price, 114.

2459. UPTON v. CURTIS, 1 Bing. 210.

Doubted in King v. Baker, 2 Adol. & El. 24. 333:—"There is reason to suppose that the facts are not reported with perfect accuracy"—Denman.

2460. URREY v. BOWERS, 2 Brownl. 8. 20; Moor, 913. pl. 1291.

Overruled. Fossett v. Franklin, T. Raym. 225; Elliot v. Starr, 1 Freem. 299.

2461. UTICA INS. CO. v. SCOTT, 19 John. 1.

Reversed in 8 Cowen, 709.

2462. UTRETCHT v. MELCHOR, 1 Dall. 428.

Imperfectly reported, Ritchie v. Summers, 3 Yeates R. 539.
Doubted also in Dorsey v. Jackson, 1 S. & R. 51.

2463. UTTERSON v. VERNON, 3 D. & E. 539.

This case was subsequently revised and overruled, in 4 D. & E. 570.

2464. UXBRIDGE v. STAVELAND, 1 Ves. sen. 56.

Arose upon a covenant in a lease:—Ld. Hardwicke said—"Had it been covenanted to grind all the corn they should spend ground, it might relate to the premises, and running with the land, bind the assignees."

Doubted in Keppell v. Bailey, 2 M. & K. 517. (8 Cond. R. 122.) See Smith's L. Cas. p. 27, note, and see Spencer's case, (ante).

2465. VACHEL v. BRETON, 5 Bro. P. C. 51.

Doubted in 5 Leigh's R. 239.—Brooke, J. said—It was "doubtfully reported." Tucker, P. in S. C. p. 249 said:—"The Master of the Rolls, (in Pickering v. Stamford, 3 Ves. 338,) in delivering his opinion, gives as I conceive the true exposition of Vachel v. Breton," &c.—"The Ld. Chancellor, however, in the same case, did impugn the authority of this case, declared his disapproval of the reversal of the decree at the rolls by the parliament, and says the case does not seem to be a case to be followed."

2466. VAISE v. DELAVAL, 1 D. & E. 11.

Ld. Mansfield rejected the affidavit of a juror, who stated that the jury, being divided, tossed up, and the plaintiff won.

But such evidence was held admissible in Smith v. Cheetham, 3 Caines, 57. So in Massachusetts. Grinnell v. Phillips, 1 Mass. 542. But in Massachusetts it was afterwards held that such affidavit should not be admitted to prove the *motives* or *inducements* to join in a verdict. Bridge v. Eggleston, 14 Mass. 248.

In Pennsylvania the practice agrees with that in England. Claggage v. Swan, 4 Bin. Rep. 150.

Vid. also Rex v. Wooler, 2 Starkie, 111, that no affidavit can, in any case, be admitted to show that one of the jury did not assent to the verdict pronounced by the foreman.

2467. VALLEJO v. WHEELER, Cowp. 143.

Buller, J. says there is an error in this report, in stating that Darwin chartered the ship to Brown, the captain, when in fact she was chartered by Brown to Darwin. 1 D. & E. 330; Marshall on Ins. 454.

2468. VANCE v. M'NAIRY, 3 Yerg. R. 177.

That the return of the sheriff was essential to the title of the purchaser.

Overruled in Mitchell v. Lipe, 8 Yerg. R. 179.

2469. VAN CORTLANDT & OTHERS v. UNDERHILL, 2 J. Ch. R. 339.

Reversed in 17 John. R. 405.

2470. VANDENHEUVEL v. THE UNITED INS. CO., 2 J. Cas. 127.

The sentence of a foreign Admiralty Court is *conclusive* in respect to the property insured.

Reversed in 2 J. Cas. 451. 481. 487; 9 J. R. 277; 2 Cowen, 66.

2471. VANDERHEYDEN v. REID, 1 Hopk. 409.

Reversed in Reid v. Vanderheyden, 5 Cowen, 719; Held, that a party having no interest cannot be a party in any court.

2472. VANDERZEE v. WILLIS, 3 Bro. C. C. 21.

Doubted in Adams v. Claxton, 6 Ves. 226.

2473. VANE v. STUDLEY, cited in Wade's Case, 5 Co. 114.

Doubted by Ch. J. Kent, in 2 John. R. 469; "This case of Vane v. Studley is cited cautiously, and stated, *as said* to have been so adjudged."

2474. VAN RENSSELAER v. THE SHERIFF OF ALBANY, 1 Cowen, 510.

"If a junior creditor becomes a purchaser, though under a senior judgment, he must bid the amount of the older execution and of his own lien, if he intends to secure himself out of the property sold."

Denied in Jackson v. Budd, 7 Cowen, 666, by Woodworth, J. "That point, abstractly and broadly stated was not before the court," &c.

2475. VARNUM v. CAMP, 1 Green's R. 326.

The general principle of law, that personal property has no locality, but is transferable according to the laws of the owner's domicil, is not without its exceptions; thus, though the contract be valid in New York, the domicil of the parties, it is not valid in N. Jersey, if it is condemned by a positive statute.

Doubted. See Hall v. Mulhollan, 7 Lou. R. 383; King v. Harman's Heirs, 6 ib. 607.

2476. VAUGHAN v. BARREL, 5 Verm. R. 333.

An administrator appointed in another state has no authority to discharge a debt due from a citizen of Vermont to his intestate; and if ad-

ministration is granted here, such discharge would be no bar to an action for the debt.

Oppo. Gaylord v. Stevens, 11 Mass. 256; Trecothick v. Austin, 4 Mason, 16. 33:—Story, J. said—"payments voluntarily made to a foreign administrator, would now be held effectual in our courts, upon principles of national amity. This doctrine supported by Atkins v. Smith, 2 Atk. 63, and still more fully and forcibly illustrated by the very able opinion of Mr. Chancellor Kent, in Doolittle v. Lewis, 7 John. Ch. R. 45."

2477. VAUGHAN'S REPORTS.

Ld. Ch. J. Treby in the great case of Courtney v. Bower, in C. B. 1669, in consequence of having to answer an objection from the case of Sheppard v. Gosnold, in page 169, Vaughan says 'These reports are so full of mistakes that I do not think they are my Lord Vaughan's. I have heard it was a posthumous work. Some of the cases are written out by himself and give a true picture of his mind; but there are others and that of S. & G. I take to be one, that were only taken from loose notes; and which he intended to have perfected if he had lived. This I say without reflection on so very learned a man.' MS. note to Mr. Hargrave's copy of Vaughan R. 1677—in Lond. Jur. Vol. 3. p. 338.

2478. VAUX'S CASE, 4 Rep. 44.

Vaux was indicted for murder, and upon special verdict there was judgment of acquittal. Being again indicted for the same offence, he pleaded *autrefois acquit*, but the plea was held bad, because his life had never been in danger.

Said to have been shaken. 1 D. & E. 69, and doubted per Livingston, J. in New-York, in The People v. Barrett, 1 Johns. 72.

2479. VENAFRA v. JOHNSON, 6 C. & P. 50.

The opinion of Park, J. directing a nonsuit in an action for a malicious prosecution on the ground that the facts were all one way.

Overruled in S. C. 10 Bing. 301: It should have been left to the jury to determine whether the charge ascribed to the plaintiff was spoken with the bearing and intent supposed.

2480. 1 VENTR. 238, the case cited by Hale.

Denied to be law per Ld. Mansfield, on account of the fraud practised on the carrier. Gibbon v. Paynton, 4 Burr. 2298.

2481. VERNON v. VAWDRY, Ventris, 40.

Denied in Ex. of Gadsden v. Ex. of Lord, 1 Eq. R. 216—S. Carolina.

2482. VERNON'S REPORTS.

Ld. Hardwicke, (1 Atk. 556,) 'sorry to find the reports of so able a

man should be so imperfect.' Ld. Kenyon, (in B. R. 1799) said, 'that it had been an hundred and an hundred times lamented that Vernon's Reports were published in a very inaccurate manner. He was the ablest man in his profession.' See 8 T. R. 266. Ld. Loughborough (1 H. Bl. 326,)—'usually inaccurate.'

But Chan. Kent (1 Kent's C. 459,) says "Vernon's Reports are the best of the old reports in Chancery. In 1806 Mr. Raithby favored the profession with a new and excellent edition, enriched by learned notes from the register's books, so that the volumes assumed a new dress and more unquestionable authority." Sed see 1 Moll. 526.

2483. VESEY JUN. REPORTS.

"When he reported Ld. Thurlow's cases, Mr. Vesey was a very young man; *afterwards*, he became an excellent reporter." Colhoun v. Thompson, 2 Moll. 287.

2484. VILLA REAL v. LORD GALWAY, Amb. 682.

"The case is not clearly reported." (Per Ld. Chan. in 3 Cond. Eng. Ch. R. 361.)

2485. VILLARS v. PARRY & MOORE, 1 Ld. Raym. 182.

Debt v. an executor, and judgment against him *de bonis propriis*, and held not amendable.

But contradicted by Short v. Coffin, where the fault was amended after error brought, and *in nullo est erratum* pleaded. 5 Burr. 2730.

2486. VINCENT v. BRADY, 2 Bl. R. 1; STACEY v. FREDERICI, 2 B. & P. 390.

The Courts do not discharge on common bail where it appears from affidavits that the validity of the defendant's certificate is to be questioned on the trial.

Denied in New York in Reed v. Gordon et al., 1 Cow. R. 50, where the practice is different. 'The court will not try the validity of a discharge under the insolvent acts, by affidavits.' Noble v. Johnson, 9 J. R. 259.

2487. VINCENT v. HOLT, 4 Taunt. 452.

Doubted. See Latham v. Hide, 1 Dowl. Pr. R. 504. 506—Bayley.

2488. VINER'S ABRIDGMENT.

"Viner is not an authority. Cite the cases that Viner quotes, *that* you may do." Per Foster, J. 1 Burr. 364.

2489. 12 VIN. ABR. TIT. EV. T. b. pl. 27.

That a common seal attached to a deed is sufficient evidence to make title without further proof.

Denied in Den v. Relandt, 2 Hals. 353.

2490. VISCHER v. YATES, 11 John. R. 23.

Reversed in Yates v. Foot, 12 John. 1.

2491. VIVIAN v. BLAKE et al., 11 East, 263.

Overruled in Hart v. Cutbush, 2 Dowl. Pr. R. 456:—Held, that if a defendant pleads the general issue and several special pleas, and the jury finds for him on the general issue, and for the plaintiff on the special pleas, the latter is entitled to the costs of the pleadings, and witnesses on those pleas.

2492. VOOGHT v. WINCH, 2 B. & A. 662.

Whether the verdict in a former suit, when offered in evidence under the general issue, in a subsequent action, was as conclusive a bar, as if it had been pleaded by way of estoppel. The judges proceed to say, "it would have been conclusive if pleaded in bar to the action by way of estoppel."

Denied in Shafer v. Stonebraker, 4 Gill. & J. 345.—Dorsey, J.—See also Outram v. Morewood and Wife, 3 East, 345; Miles v. Rose et al., 5 Taunt. 705, and Standish v. Parker, 2 Pick. 20; Estill v. Taul, 2 Yerg. R. 470; Bennett v. Holmes, 1 Dev. & B. Rep. 486.

2493. VYVYAN v. ARTHUR, 1 B. & C. 410.

Covenant by the devisee of the lessor, against the personal representative of the lessee, upon a lease containing, in the *reddendum*, a reservation of suit to the lessor's mill, by grinding there all the corn grown upon the land demised. The court decided that the action lay, upon the ground that both the mill and the reversion, were in the ownership of the assignee of the covenantee.

Doubted in Keppell v. Bailey, 2 M. & Keene, 517. (8 Cond. R. 122, 3).

2494. WADDINGTON v. OLIVER, 5 B. & P. 61.

Plaintiff cannot bring an action "until the time for the delivery of the whole had arrived."

Doubted in M'Millan v. Vanderkip, 12 J. R. 165; Champlin v. Rowley, 13 Wend. 261, where Nelson, J. says, that it "was disregarded in that case, and in the subsequent cases. 13 J. R. 94, and ib. 365."

2495. WADE v. HOWARD, 6 Pick. 492.

Explained in Thompson v. Chandler, 7 Greenl. 380.

2496. WADE v. PAGET, 1 Bro. C. C. 364.

'The case is very imperfectly reported in Brown.' Sug. on Pow. p. 438, n. (1).

2497. WADSWORTH v. HAMSHAW, cited in 2 Bro. & B. 5; Williams v. Mundie, R. & M. 34.

Ld. Tenterden says, "what an attorney learns otherwise than for the purpose of bringing an action or suit, he is bound to communicate.

Denied in Thompson v. Andrews, 1 Myl. & Keene, 116, (6 Cond. R. 516). See Clark v. Clark, 2 Moo. & Malk. 3; Greenough v. Gaskell, 1 Myl. & K. 98.

2498. WADSWORTH v. WENDELL, 5 J. Ch. R. 229.

Reversed in Wendell v. Wadsworth, 20 John. R. 659. (See Jackson v. Neely, (ante).

2499. WAIN v. WARLTERS, 5 East R. 10.

That the consideration of the promise as well as the promise itself, should be in writing, to take it out of the statute of frauds.

Denied in Hunt v. Adams, 5 Mass. R. 360; Packard v. Richardson, 17 ib. 122; Levy v. Merrill, 4 Greenl. R. 180; ib. 387; Sage v. Wilcox, 6 Conn. R. 81; Miller v. Irvine, 1 Dev. & B. R. 103. In Ex parte Minet, 14 Ves. 189, Lord Eldon said, there was a variety of authorities directly contradicting Wain v. Warlters; and in Ex parte Gardom, 15 Ves. 286, he says, "Until that case was decided I had always supposed *the law to be clear*, that if a man agreed in writing to pay the debt of another, it was not necessary that the consideration should appear in the writing." See also, Egerton v. Matthews, 6 East, 307.

But in New-York, the English law is affirmed in Leonard v. Vredenburgh, 8 J. R. 29; Lanson v. Wyman, 16 Wend. 246. See Saunders v. Wakefield, 4 B. & A. 596; Wood v. Benson, 2 Tyrw. 98; Bushell v. Bevan, 1 Bing. N. C. 103; Hawes v. Armstrong, ib. 761; Ellis v. Levi, ib. 767; James v. Williams, 5 B. & Ad. 1109; Clancy v. Piggott, 2 Ad. & Ell. 473. But it is sufficient if the consideration can be gathered from the whole tenor of the writing, not that a mere *conjecture*, however plausible, would be sufficient to satisfy the statute, but there must be a well grounded inference to be necessarily collected from the terms of the memorandum. *See the judgments* of Tindal, C. J., in Hawes v. Armstrong, and of Patteson, J. in James v. Williams, (supra.) A guaranty expressed to be in consideration that the plaintiff "would withdraw *the* promissory note," Held, that parol evidence was admissible to show what note was meant. Shortrede v. Cheek, 1 Ad. & El. 59. The agreement may also be collected from different papers. Dobell v. Hutchinson, 3 Ad. & El. 555.

The act does not direct that the promise shall be *void*, but that "no action shall be brought" upon it; and Bosanquet, J. remarks (in Laythroap v. Bryant, 2 Bing. N. C. 744,) that the 17th section is stronger than the 4th, for the 17th avoids contracts not made in the manner there prescribed. Though no *action*, therefore, can be brought upon a parol guaranty, the courts have been known to enforce one against an attorney, by virtue of their summary jurisdiction over their own officers, *see* Evans v. Duncan, 1 Tyrw. 283. See Peter v. Compton, ante.

2500. WALDEN v. THE N. Y. FIRE INS. CO., 12 John. R. 128.

Reversed in The N. Y. Fire Ins. Co. v. Walden, 12 John. R. 513.

2501. WALDREN v. SHERBURNE, 15 John. R. 409.

S. P. as in Hackley v. Patrick, (ante).

2502. WALKER v. BURNELL, Doug. 319; 3 D. & E. 322.

The dictum of Ld. Mansfield, that creditors, who prove their debts under a new commission, cannot question its validity.

Overruled in Rankin v. Horner, 16 East, 322.

2503. WALKER v. CHAPMAN, Lofft's Rep. 342. cited Doug. 454.

Mansfield, C. J. called this "a very strange case." Aubert v. Walsh, 3 Taunt. 283.

2504. WALKER v. CONSTABLE, 1 Bos. & Pul. 307; 2 Esp. 659.

That in an action for money had and received the nett sum received was all which could be recovered, without interes t.

But in Massachusetts interest is given on money fraudulently obtained or wrongfully kept back, &c. Wood v. Robbins, 11 Mass. 504, and cases there cited. So in New York. Pease v. Barber, 3 Caines, 266. Vid. also Emmerson v. Heelis, 2 Taunt. 38, and Sheriff v. Potts, and Tappenden v. Randall, (ante).

2505. WALKER v. LAVERTY et al., 6 Mum. 487.

An acknowledgment of the debt and a promise to pay, amount to a waiver of all notice; the holder in such case need not prove notice given.

Oppo. Trimble v. Thorne, 16 John. R. 152.

2506. WALKER v. LISCARRY, 6 Esp. 98.—Ellenborough.

Where an annuity has been granted for a sum paid as a consideration for it, that is, money had and received from the grant, if the annuity is at any subsequent time set aside, and where the grantor became bankrupt after the grant, but subsequent to its being set aside, it is barred by his certificate.

Denied in Cowper v. Godmond, 9 Bing. 748; 3 M. & S. 219. S. C.

2507. WALKER v. PACKER, Cooke's Ca. 47.

That a pauper shall pay costs for all defaults, &c.
Denied in Rice v. Brown, 1 Bos. & Pul. 39.

2508. WALKER v. REEVES, 2 Doug. 461. n.

Same principle as in Eaton v. Jaques, ante; and is said to have been denied. Powel on Mort. 241.

2509. WALKER v. WETHERELL, 6 Ves. 473.

Overruled. Carmichael v. Wilson, 3 Moll. 79.

2510. WALKER v. WITTER, 1 Doug. 1.

Ld. Mansfield :—"The judgments of courts of record in England cannot be controverted. *Foreign Courts*, and courts in England not of record, have not that privilege. Foreign judgments are a ground of action every where, but they are examinable."

Doubted in Galbraith v. Neville, 1 Doug. 6. note—Ld. Kenyon. And in Martin v. Nicolls, 3 Simons, 458. (5 Cond. R. 198.) Held, that a foreign judgment cannot be questioned in the courts in this country. Therefore a bill for a discovery and a commission to examine witnesses abroad, in aid of the plaintiff's defence to an action brought in this country on a foreign judgment, is demurrable. 1 Stark. Ev. 229. *et seq.* But See. 1 Phill. Ev. 251. *et seq.* and notes. Buttrick v. Allen, 8 Mass. 274.

2511. WALKER v. WOOLASTON, 2 P. Wms. 576.

Doubted to the extent which it goes. Ellis v. Deane, 1 Beat. 13.

2512. WALKER'S CASE, 3 Co. R. 22.

Denied in Howland v. Coffin, 12 Pick. 125, 126 ;—"Though decided right as to the question on which the case turned, has been questioned as to other points."

2513. WALLACE v. SMALL, 1 M. & M. 446, and note.

An offer of a specific sum by way of compromise is admissible in evidence, unless accompanied with a caution that the offer is confidential.

Denied (in 11 Conn. 514,) where Huntington, J. says—it is "opposed to the previous and subsequent decisions on this point; and we cannot yield to their authority."

2514. WALLIS v. DELANCY, 7 T. R. 266. n.

S. P. as in Nelson v. Whittall, (ante).

2515. WALLIS v. GILL, 3 M'Cord, 475.

Qualified in Mitchell v. Conolly, 1 Bayley, 203. 205 :—"It was a

hasty opinion, and illy digested throughout. And one with which I have always been dissatisfied; but discovered the error too late to suppress the publication. The decision itself was correct."—Nott, J.

2516. WALPOLE v. EWER, Park on Ins. 423.

Overruled. See the observations of Park, J. in Simonds v. Hodgson, 6 Bing. 114; and Lord Ellenborough in Power v. Whitmore, 4 M. & S. 141.

2517. WALTER v. MAUNDE, 19 Ves. jun. 426.

Sugden on Pow. p. 269, n. (y) says, "if correctly reported, shows that Ld. Eldon, for the moment forgot the rule." See Harding v. Glyn, 8 Ves. jun. 572, 573.

2518. WALTON v. SHELLY, 1 Term R. 296.

Overruled in Jordaine v. Lashbrooke, 7 Term R. 597; and rejecting the doctrine "that no party who has signed a paper or deed, shall ever be permitted to give testimony to invalidate that instrument, which he hath so signed." (Acc. Pres. Dir. & Co. of Utica Bank v. Hillard, 5 Cowen, 153.)

2519. WALWYN v. ST. QUINTIN, 1 B. & P. 652.

Doubted in Norton v. Pickering, 8 B. & C. 610; Walwyn v. St. Quintin was quoted as in direct contradiction to Cory v. Scott, 3 B. & Ald. 619, and Lord Tenterden said, "I think the case of Cory v. Scott, 3 B. & A. 619, was properly decided."

2520. WARBURTON v. LYTTON, cited in 4 Bro. 440. 447.

S. P. as in Strickland v. Croker, (ante).

2521. WARD v. HAYDON, 2 Esp. N. P. R. 553.

Ld. Kenyon held, that a defendant in an action of trover, who suffers judgment by default, may be a witness for his co-defendants, as he is not liable to the costs of the issue tried against the other, and is not himself released, whatever may be the event of that issue.

Overruled in Marsh v. Smith, 1 C. & P. 577; Bohun v. Taylor, 6 Cowen, 313; 6 Binn. 319.

2522. WARD v. MACAULEY, 4 D. & E. 483.

Ld. Kenyon afterwards retracted that part of his opinion which states that trover would lie under the circumstances of this case.

Vid. Gordon v. Harper, 7 D. & E. 11.

2523. WARDELL v. EDEN, 1 J. R. 331, n. (a).

S. P. as in Andrews v. Beecker, (ante).

2524. WARDELL v. HOWELL, 9 Wend. 170; ROSA v. BROTHERSON, 10 ib. 85; ROOT v. FRENCH, 13 ib. 570; PAYNE v. CUTLER, 13 ib. 605; DICKERSON v. TILLINGHAST, 4 Paige's Ch. R. 215. 222; FULTON BANK v. PHŒNIX BANK, 1 Hall, 562.

An antecedent debt is not such a valuable consideration as will support the claim of a *bona fide* holder of a negotiable instrument, to the injury of the right of the original parties.

Oppo. Brush v. Scribner, 11 Conn. R. 388.

2525. WARING v. DEWBURY, PALGRAVE v. WINDHAM, 1 Stra. 97. 214.

To entitle a landlord to his motion against the sheriff, he must have made a demand and given notice of the rent due before the goods were removed.

Overruled in Smith v. Russell, 3 Taunt. 400; Arnott v. Garnett, 3 B. & A. 440. See Beekman v. Lansing, 3 Wend. 446 acc.

2526. WARNEFORD v. WARNEFORD, 2 Str. 764.

That sealing a will is sufficient signing, within the stat. of frauds.

Denied in Smith v. Evans, 1 Wils. 313; also, in 1 Ves. Jr. 13.

2527. WARREN v. GREENVILLE, 2 Str. 1129.

An entry in a book, whereby the party making it, charges himself with the receipt of money on account of a third person, or acknowledges the payment of money due to himself, is, after the death of the party who made it, admissible evidence against third persons, to prove the fact of the receipt of the money.

Explained. "Upon that ground entries made by receivers, stewards and other agents, charging themselves with the receipt of money, have been held, after their death, to be admissible in evidence, to prove the fact of the receipt of such money, and that without reference to the particular character of the person who made such entries. In Warren v. Greenville, 2 Str. 1129, the party who made the entry, was an attorney; in Manning v. Lechmore, 1 Atk. 453, a bailiff; in Hingham v. Ridgway, 10 East, 109, a surgeon."—Per Parke, J. in Middleton v. Melton, 10 B. & C. 317:—Held, that an entry made by a deceased collector of taxes in a private book, kept by him for his own private convenience, in which he charged himself with the receipt of sums of money, was evidence against a surety of the fact of the receipt of such money in an action on a bond conditioned for the due payment of the taxes by the collector, although the parties by whom the money had been paid were alive, and might have been called as witnesses; and that upon the general principle that the entry was to the prejudice of the party who made it. See also Merrill v. The Ithaca, &c. R. R. Co., 16 Wend. 586. 593, *et seq.*

2528. WARREN v. MANUF. INS. CO., 13 Pick. 518.

A non-compliance with a statute made for the benefit of the crew and passengers will not render the vessel unseaworthy on this account. Such a contract is only voidable by the individuals for whose benefit it was made, although a penalty is imposed.

Doubted. See De Bignis v. Armistead, 10 Bing. R. 107—Tindal :— for a penalty implies a prohibition. Stephen v. Robinson, 2 Tyrw. 280, and Smith on M. Law, p. 315, 316.

2529. WARREN v. MATTHEWS, 1 Salk. 357; 6 Mod. 73. S. C.

Ld. Holt said, "The subject has a right to fish in all navigable rivers, as he has a right to fish in the sea."

Denied in Rogers v. Jones, 1 Wend. 258—Woodworth, J. :—"are very briefly reported, and are not supported by the authorities cited, there is good reason to believe the case itself misreported."

2530. WARREN v. STAGG, cited in 3 T. R. 591.

S. P. as in Cuff v. Penn, (ante).

2531. WASHBURN v. PICOT, 3 Dev. 390.

S. P. as in Morgan v. Richardson, (ante.)

2532. WATE v. BRIGGS, 1 Ld. Raym. 35; 2 Salk. 565; 5 Mod. 8.

Debt by plaintiff *in jure suo proprio* for escape of one in execution on a judgment recovered by plaintiff as administrator; held, illy brought.

Denied in Bonafous v. Walker, 2 D. & E. 128; Morse v. James, Willes, 127.

2533. WATERBURY v. MATHER, 16 Wend. 611.

Assumpsit against two defendants; one is arrested and the other returned *not found;* and it appearing on the trial that defendant *not found* is *misnamed* in the declaration; he is called John instead of George :— Held, that this was a variance upon which to ground a nonsuit.

Doubted. 2 Phill. Ev. 132; Barry v. Foyles, 1 Pet. R. 311.

2534. WATERMAN v. SOPER, 1 Ld. Raym. 737; 2 Roll. R. 255.

Denied in Holder v. Coates, 1 Moo. & Malk. 112—Littledale, J. :— "There is another case on that subject (Masters v. Pollie, 2 Roll. R. 141,) in which it was considered that, if a tree grows in A.'s close, though the roots grow in B.'s, yet the body of the tree being in A.'s soil, the tree belongs to him.—The doctrine in the case of Masters v. Pollie is preferable to that in Waterman v. Soper." Accordingly, he held that if a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or

planted. So also it seems is the civil law. Holder v. Cates, *supra*, p. 114, note. See Lyman v. Hale, 11 Conn. 184.—Williams.

2535. WATERS v. MATTINGLY, 1 Bibb. R. 244.

Overruled in Stewart v. Dougherty, 3 Dana, 480: Held, that an innocent misrepresentation—not being fraudulent, furnishes no sufficient ground for rescinding a contract.

2536. WATSON v. BOURNE, 10 Mass. R. 337.

That a discharge of the contract can only operate, where the law is made by an authority, common to both creditor and debtor in all respects; where both are citizens, &c.

Overruled in Blanchard v. Russell, 13 Mass. 1. But see Braynard v. Marshall, 8 Pick. 194.

2537. WATSON v. MAIN, 3 Esp. R. 15.

That the st. 11 G. 2. c. 19. s. 1, which enabled landlords to seize for rent in arrear, goods clandestinely removed, did not extend to rent *before* it became due.

Doubted in Furneaux v. Fotherly, 4 Camp. 136.—Ellenborough:—but in Rand v. Vaughan, 1 Bing. N. C. 767, the law of Eyre C. J. in Watson v. Main was affirmed.

2538. WATSON AND PAUL v. THE INS. CO. OF N. AMERICA, 4 Dall. 283.

Doubted in Brown v. Phœnix Ins. Co., 4 Binn. 464—Tilghman, C. J.

2539. WATSON v. POWELL, 3 Call, 306.

S. P. as in Kennon v. M'Roberts, (ante).

2540. WATSON v. SMITH, Cro. Eliz. 723.

Trover will not lie for a bond.

Denied in Bac. Abr. (Trover, D.) and Hudspeth v. Wilson, 2 Dev. R. 372.

2541. WATSON v. TURNER, Bull. N. P. 129, 147. 281.

That an express promise upon a *moral* obligation, will support an assumpsit.

Doubted in Wennall v. Adney, 3 B. & P. 249 n. See Paynter v. Williams, 1 Cromp. & Mees. 810. But every *moral* obligation is not perhaps sufficient for this purpose. See per Lord Tenterden, C. J., in Litchfield v. Shee, 2 B. & Adol. 811.

2542. WATSON v. WATSON, 9 Conn. R. 140.

Doubted in Pierson v. Gale, 8 Verm. R. 509.

2543. WATTS v. BELLAS, 1 P. Wms. 60.

The reasoning of Ld. Keeper Wright in this case "was too large, owing to his being then new in the court," &c. Per Ld. Hardwicke, 3 Atk. 189.

2544. WATTS v. HART, 1 Bos. & Pul. 134.

Overruled in Ex parte Charles, 14 East, 197, and Walker v. Barnes, 5 Taunt. 778.

2545. WATTS et al. v. THE PUBLIC ADMINISTRATOR OF N. Y., 1 Paige Ch. R. 347.

Reversed in S. C. 4 Wend. R. 168.

2546. WATTS' CASE, Hardr. 321, 2.

That in perjury, the party grieved shall not be a witness.

Overruled in Rex v. Broughton, 2 Str. 1229; Abrahams v. Bunn, 4 Burr. 2251.

In forgery, the party injured is still incompetent as a witness, in England. 4 East, 582. So in Connecticut. 1 Root, 307. But not in Pennsylvania. 1 Dall. 110. Nor in Massachusetts. 1 Mass. 7. Vid. 1 Esp. 97. Day's ed. note 2.

2547. WEAVER v. BOROUGHS, 1 Str. 648.

That where there is a special agreement, the Plf cannot go upon a general *indebitatus assumpsit*.

Denied. Doug. 651. Buller's N. P. 139.

2548. WEAKLEY Ex Dem. YEA v. BUCKNELL, Cowp. 473.

That an *equitable* title is a good defence *at law*, in ejectment.

Overruled in Doe v. Wharton, 8 D. & E. 2. Vid. also 5 East, 132. and Goodtitle v. Bayley, ante.

2549. WEAVER v. CLIFFORD, Yelv. 42.

Misreported. Vid. 1 Brownl. 120. S. C. Bac. Abr. Escape A. 1. acc.

2550. WEBB v. BELL, 1 Sid. R. 440.

That the horses and harnesses fastened to a cart loaded with corn, may be distrained for rent.

Doubted in Simpson v. Hartopp, Willes, 517; But see Potter v. Hall, 3 Pick. 368; See 3 K. C. 478.

2551. WEBB v. HARVEY, 2 T. R. 757.

Denied in Clarke v. Bradshaw, 1 East, 88; And in Lewis v. Pine, 1 Cromp. & Mees. 771:—Lewis v. Pine decides, that in *scire facias* if the bail were summoned after 8 o'clock on the evening before the return day of the *sci. fa.* it is regular.

2552. WEBB v. PATERNOSTER, Poph. 151.—Palm. 71.

Haughton, J. held, that a license, when executed, is not countermandable; *but it is otherwise while it remains executory*.

Doubted in Gausen v. Morton, 10 B. & C. 731:—Held, that A. being indebted to B. in order to discharge the debt executed to B. a power of attorney, authorising him to sell certain lands belonging to him, A.:—this being an authority coupled with an interest, could not be revoked. See Hodson v. Anderson, 3 B. & C. 851; See 6 Greenl. 200; Liggins v. Inge, 7 Bing. 662; See 2 Phil. Ev. 83, and see Wood v. Lake, (post).

2553. WEBB v. RORKE, 2 Scho. & Lef. 661.

Doubted it seems in some degree. Math. On Presump. Ev. 410 n. (c).

2554. WEBB v. WINSLOW, 3 Dane Abr. 398.

Denied in Linscott v. Fernald & al., 5 Greenl. R. 501—Mellen, C. J.—It 'is very briefly stated, and we have very few facts to learn the grounds of the decision.'

2555. WEBSTER v. LEE, 5 Mass. R. 334.

S. P. as in Appleton v. Boyd, (ante).

Overruled in Bull v. Loveland, 10 Pick. 12 to 14; Also denied in 1 Fairf. R. 251—Parris, J.—in respect to the intimations of the Ch. J. "that a negotiable note paid by the maker to the promisee previous to its arriving at maturity and before indorsement, is *functus officio* and cannot be negotiated." It being now settled, that the holder, who receives it *fairly* before it becomes due can recover upon it though it has been paid.

2556. WEDGWOOD v. BAILEY, 1 Freem. 532.

Reversed on error. T. Raym. 463.

2557. WEEDON v. MEDLEY, 2 Dowl. 689.

S. P. as in Irving & al. v. Eaton, (ante).

2558. WEEDON v. TIMBRELL, 5 T. R. 357; Esp. 16.

S. P. Hodges v. Windham, Peake, 39, and Bartelot v. Harskew, Peake, 7.

That no action of trespass for crim. con. could be brought for an act of adultery after a separation between the husband and wife.

Overruled in Chambers v. Caulfield, 6 East, 244; 2 Smith, 356.

2559. WEINOLT v. ROBERTS, 2 Camp. R. 586.

S. P. as in Grove v. Dubois, (ante).

2560. WEIR v. ABERDEEN, 2 B. & Ald. 320.

If there be unseaworthiness at the commencement of the voyage, and the defect is cured before loss, a subsequent loss is recoverable under the policy.

Doubted it seems in M'Lanahan v. Universal Ins. Co., 1 Pet. R. 184. But see Paddock v. Franklin Ins. Co., 11 Pick. 232 3, 4.

2561. WELCH v. CREAGH, 8 Mod. 373; 1 Str. 680.

That debt will not lie on a promissory note.

Overruled. Meredith v. Chute, 2 Ld. Raym. 760; Bishop v. Young, 2 Bos. & Pul. 78.

2562. WELD v. HADLEY, 1 N. H. R. 295.

A tender and refusal of specific articles according to the contract transfers no property.

Denied in Slingerland v. Morse, 8 John. R. 474; Nicholas v. Whiting, 1 Root, 448; Rix v. Strong, ib. 55; Smith v. Loomis, 7 Conn. 110; Mitchell v. Merrill, 2 Blackf. R. 87. See Robbins v. Luce, (ante).

2563. WELDON v. BUCK, 4 John. R. 144.

S. P. as in Hendricks v. Franklin, (ante).

2564. WELFORD v. LIDDEL, 2 Ves. 400.

Ld. Hardwicke held, that a merchant's account will be barred, if there is no item within six years.

Oppo. Catling v. Skoulding, 6 T. R. 189. But see Foster v. Hodgson, 19 Ves. Jr. 184, 5; Blair v. Drew, 6 N. H. R. 235:—"Neither Cranch v. Kirkman, Peake's R. 121, or Catling v. Skoulding, can be supported." See 2 Phill. Ev. 143. The following cases seem to confine the exception in the statute strictly to mercantile transactions between merchants. Martin v. Heathcote, 2 Eden, 169; cited 5 J. Ch. R. 528; 20 J. R. 583. 592. 599. Murray v. Coster, Codman v. Rogers, 10 Pick. 118; Spring v. Gray, 5 Mason, 525; 6 Pet. R. 151, S. C.; Blair v. Drew, supra. See Green v. Caldcleugh, 1 Dev. & B. 320.

2565. WELLS v. WHITEHEAD, 15 Wend. 530.

That the better opinion now is that a copy of the bill and protest need not accompany the notice, in the case of a foreign bill.

Doubted. See Chit. on B. 8th Am. ed. 498. See also Blakely v. Grant, (ante).

2566. WENTZ v. DEHAVEN, 1 S. & R. 312.

S. P. as in Martin v. Mowlen, (ante).

2567. WEST v. PRICE'S HEIRS, 2 J. J. Marshall, 388.

Intimated that] the junior patentee entering into lap, acquires a pos-

session of his entire tract, against the elder patentee, who had previously entered outside the lap.

Denied in Shrieve v. Summers, 1 Dana's R. 241.

2568. WEST v. SINK, 2 Yeates R. 274.

That rent in its nature is a demand that may be *debitum in presenti* though *solvendum in futuro.*

Denied in Bank of Pennsylvania v. Wise, 3 Watts R. 401, 2.—Kennedy.—"Surely it was a great mistake in the court to say, that rent which had not become payable was *a present debt to be paid in future.*"

2569. WEST v. WENTWORTH, 3 Cowen, 82.

Reviewed in Clark v. Pinney, 7 Cow. 681.

2570. WESTERDELL v. DALE, 7 Term R. 302. 308.

The mortgagee of a ship whether in or out of possession must be considered as the legal owner in a court of law; and as such liable for repairs.

Overruled in Trewhella v. Rowe, 11 East, 435; Twentyman v. Hart. 1 Stark. R. 366; Ring v. Franklin, 2 Hall, 1; Thorn v. Hicks, 7 Cowen, 697; Fisher v. Willing, 8 S. & R. 118; Reeve v. Davis, 1 Adol. & El. 312.

2571. WESTON v. MOWLIN, 2 Burr. 969.

What Ld. Mansfield is made to say in pp. 978, 9, that whatever will give the mortgage-money, will pass the land with it; and that the estate in the land is the same thing as the money due, &c.—is denied by Trowbridge, J. Vid. 8 Mass. supp. 557.

2572. WHARTON v. BROOK, 1 Vent. 21.—Twisden.

Doubted by Denman, C. J. See Parrat v. Carpenter, (ante).

2573. WHARTON v. PITTS, 2 Salk. 548.

Overruled. Velthasen v. Ormsley, 3 D. & E. 316.

2574. WHEALEY v. LOW, Cro. Jac. 668, cited by Ld. Holt in Coggs v. Bernard, Ld. Raym. 909, and by Sir Wm. Jones on Bailm. p. 51, and by Mr. J. Story on Bailm. p. 76, s. 98, (Deposits).

Denied in Amer. Jurist, No. 32, p. 276, 277, and 279: "if the *gist* of the action was simply to recover damages for the non-feasance, it was law neither then nor now."

2575. WHEATON v. EAST, 5 Yerg. R. 41.

S. P. it seems, as in Holmes v. Blog, (ante).

2576. WHEELER v. CURTIS, 11 Wend. 653.

The rule laid down by Neilson, J. qualified in Miller v. Maxwell, 16 Wend. 9. 23.

2577. WHEELER v. VAN HOUTEN, 12 John. R. 311.

A submission of all demands, which either party had against the other, is a bar to an action for any demand subsisting at the time of the submission and the award, although the plaintiff can prove, that the demand sued, was omitted by mistake, to be laid before the arbitrators.

Oppo. Whittemore v. Whittemore, 2 N. H. R. 26; Webster v. Lee, 5 Mass. R. 334. In Wheeler v. Van Houston, "the important principle seems to be overlooked, that courts of law possess no authority to enforce a specific performance of executory agreements." Woodbury, J. in 2 N. H. R. 26, *supra*. See Jackson v. Ambler, 14 J. R. 96.

2578. WHEELER'S CASE, Godb. 218.

That it belonged to the judges of the Courts of law, and not to the ecclesiastical Courts, to decide whether an act of parliament was broken or not.

Cited and disapproved in Camden v. Home, 4 D. & E. 398.

2579. WHISTLER v. NEWMAN, 4 Ves. 129.

Overruled in effect by Wagstaff v. Smith, 9 Ves. 920; Sturgis v. Corp, 13 Ves. 190; Essex v. Atkins, 14 Ves. 342; Vid. Claney on Married Women, 118. 123; Sugden on Powers, 106.

2580. WHITAKER v. BROWN, 8 Wend. 490.

S. P. as in Ducham v. Wallis, (ante).

Denied it seems by Parris, J. 1 Fairf. R. 249, and the cases there cited.

2581. WHISKARD v. WILDEN, 1 Burr. 300.

Doubted in Hill v. Hale, 2 New R. 202; but confirmed in Sharpe v. Abey, 5 Bing. 193; 2 M. & P. 312.

2582. WHITCOMB v. WHITING, 2 Doug. 652.

Doubted in Atkins v. Tredgold, 2 B. & C. 23; but since approved by some Judges, Perham v. Raynal 2 Bing. 306; Farmers' Bank v. Clarke, 4 Leigh R. 610; See 2 Phil. Ev. 140; See Bell v. Morrison, (ante); Burleigh v. Stott, 8 B. & C. 36; Pease v. Hirst, 10 ib. 122, but since st. 9 Geo. 4. cap. 14, "one joint contractor cannot prevent the other from taking advantage of the Statute of Limitations by any species of acknowledgment excepting a part-payment of principal or interest. But as the statute expressly saves the effect of such a payment, the principal case of Whitcomb v Whiting is still law, and has been recognized as such

in Wyatt v. Hodson, 8 Bing. 313, *ubi per* Park, Justice: "I have always considered Whitcomb v. Whiting a governing case, notwithstanding some observations which have been thrown out against it; but the case has been recognized in Burleigh v. Stott, and confirmed in Perham v. Raynal, where an acknowledgment by one of several joint-contractors on a promissory note was held to be binding on the others. That was, like the present, the case of a surety, and, therefore, expressly in point. Then the recent statute having distinguished between the effect of a promise by one of many joint-contractors, and the payment of interest by such a person, the law in respect of such a payment remains where it was under the previous decisions." Rew v. Pettet, 1 Adol. & Ell. 196, is another case to the same effect. The reason which induced the legislature to make this distinction in favor of payment is said by Tindal, Chief Justice, in Wyatt v. Hodson, to have been, because the payment of principal or interest stands "on a different footing from the making of promises, which are often rash and ill-interpreted; while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction, as not to be open to the objection of an ordinary acknowledgment." It has lately been held that if goods be given within the six years in part-payment, that takes the case out of the statute. Horne v. Stevens, 4 A. & E. 71; Hart v. Nash, 2 C. M. & R. 337.

2583. WHITE v. BEATTIE, Dev. Eq. 87.

Overruled in S. C. Dev. Eq. 320.

2584. WHITE v. SEALY et al., Doug. 49.

Defendant gave a bond in a penalty of £600, conditioned for the payment of a yearly rent by another person of £570. Two judgments had been recovered on the bond; and to the third action the defendants pleaded the first judgment in bar. The question was, whether the bond was a standing security for the rent for the whole term of 22 years, or only to the amount of the penalty. Held, that the defendants were liable only to the amount of the penalty.

Denied in Lonsdale v. Church, 2 T. R. 388, where Buller, J. who concurred in the decision in White & Sealy, declared that he was not satisfied with the decision in the latter case. In Knight v. Maclean, 3 Bro. Ch. R. 596, Buller, J. sitting for the Chancellor, decided that interest should be calculated though it exceeded the penalty; and he said that White v. Sealy went upon the defendants' being sureties. But Ld. Thurlow on re-argument, ruled that the penalty was the extent of the obligor's liability. With the latter opinion accords Clark v. Bush, 3 Cowen, 151, where all the cases were reviewed.

2585. WHITECHURCH, EX PARTE, 1 Atk. 58.

That a person may be arrested on Sunday, on a warrant for contempt in disobeying the order of Court.

Denied per Buller, J. in Rex v. Myers, 1 D. & E. 265, because not a criminal prosecution, as formerly holden.

2586. WHITEHEAD v. SAMPSON, 1 Freem. 265.

Denied in Curtis v. Vernon, 3 Term, 387, and cases cited in Ram. on Assets, &c. p. 271, n. (w): Held, that an *ex'r de son tort* may plead *puis darrein continuance*, his letter of administration, although procured after suit commenced and plea put in.

2587. WHITEHOUSE v. FROST, 12 East, 614.

After purchase of 40 tons of oil in one cistern, and a re-sale of 10 tons thereof, it was held that the purchaser of the 10 tons could recover for them in trover, without any previous separation.

Doubted in Austen v. Craven, 4 Taunt. 644, and White v. Wilks, 5 Taunt. 176.

2588. WHITELEGG v. RICHARDS, 6 Moore, 501; 3 B. & B. 188.

An order drawn up in the name of the court, by an officer of a court of justice, (for instance the clerk of the insolvent debtor's court,) is, until amended, repudiated, or rescinded, the order of the court.

Reversed in S. C. (in error); 3 D. & R. 237; 2 B. & C. 45.

2589. WHITFIELD v. M'LEOD, 2 Bay's R. 380.

S. P. as in Timrod v. Shoolbred, (post).

2590. WHITMIRE v. NAPIER, 4 S. & R. 290.

Doubted in Duncan v. Duncan, 1 Watts, 329.

2591. WHITMORE v. WILKS, 1 Mood. & Malk. 214.

A plaintiff on the record, though a mere trustee, was excluded by Ld. Tenterden, from being a witness.

Shaken in Worrall v. Jones, 7 Bing. 395; 5 M. & P. 241, S. C.:—"That a party to the record should not be *compelled* against his consent to become a witness in a court of law;—but if the party consents to be examined, he is then an admissible witness." Vide Lampton v. Lampton, 6 Mon. R. 617; Norden v. Williamson, 1 Taunt. 378; *Sed* see Supervisors of Chenango v. Birdsall, 4 Wend. 453. (See Schermerhorn v. Schermerhorn, (post).

2592. WHITNASH v. GEORGE, 8 B. & C. 556.

S. P. as the point decided in Goss v. Watlington, (ante).

2593. WHITNEY v. HOLMES, 15 Mass. R. 152.

That an award of arbitrators cannot establish the title to land.

Explained in Jones v. Boston Mill Corporation, 6 Pick. 148; Ch. J. Parker expressly says, *that the award itself would establish the title,* citing 15 John. 497. 197.

2594. WHITNEY v. PECKHAM, 15 Mass. 243.

In an action for a *malicious prosecution,* the recovery in a competent jurisdiction is conclusive evidence of *probable cause.*

Denied in Burt v. Place, 4 Wend. R. 598.

2595. WHITNEY v. STERLING, 14 John. R. 215; M'Pherson v. Rathbone, 11 Wend. 96.

That it is competent to prove the partnership by general reputation.

Doubted in Roscoe on Ev. p. 212; Bernard v. Torrance, 5 Gill & J. 383.

2596. WIGGLESWORTH v. DALLISON, Doug. 201.

A custom that the tenant, whether by parol or deed, shall have the way-growing crop, after the expiration of his term, is good, if not repugnant to the lease by which he holds.

Explained in Hutton v. Warren, 1 Mee. and Wel. 466. 474, by Mr. B. Parke. "It has been long settled," (said his Lordship,) "that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the common law was wisely applied where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have so long been regulated upon the supposition that all customary obligations not altered by the contract are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed.

"The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the court should have been favorably inclined to the introduction of those regulations in the mode of cultivation, which custom and usage have established in each district to be the most beneficial to all parties.

"Accordingly, in Wigglesworth v. Dallison, afterwards affirmed on a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right; and lord Mansfield said the custom did not alter or contradict the lease, but only added something to it.

"The question subsequently came under the consideration of the Court of

King's Bench in Senior v. Armitage, reported in Mr. Holt's Nisi Prius Cases, p. 197. In that case, which was an action by a tenant against his landlord for a compensation for seed and labor, under the denomination of tenant-right, Mr. Justice Bayley, on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The court afterwards set aside that nonsuit, and held, as appears by a manuscript note of that learned Judge, that, though there was a written contract between landlord and tenant, the custom of the country would still be binding, if not inconsistent with the terms of such written contract; and that, not only all common law obligations, but those imposed by custom, were in full force where the custom did not vary them. Mr. Holt appears to have stated the case too strongly when he said that the court held the custom to be operative, "unless the agreement in express terms excluded it;" and probably he has not been quite accurate in attributing a similar opinion to the Lord Chief Baron Thompson, who presided on the second trial. It would appear that the court held that the custom operated, unless it could be collected from the instrument, *either expressly or impliedly*, that the parties did not mean to be governed by it.

"On the second trial, the Lord Chief Baron Thompson held that the custom prevailed; although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it or left at the end of the tenancy, without any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive a compensation for seed and labor.

"The next reported case on this subject is Webb v. Plummer, 2 B. & A. 750: in which there was a lease of down lands, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for the fallowing land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground and threshing the corn. The claim was for a customary allowance for *foldage* (a mode of manuring the ground;) but the court held as there was an express provision for some payment, on quitting, for the things covenanted to be done, and an omission of *foldage*, the customary obligation to pay for the latter was excluded. No doubt could exist in that; the language in the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, and no more.

"The question then is, whether, from the terms of the lease now under consideration, it can be collected that the parties meant to exclude customary allowance for seed and labor."

In Smith's L. Cas. p. 306, *et seq.* are the following additional observations, "In the case from which the above is extracted, *viz.*, Hutton v. Warren, 1 Mee. & Wel. 466, a custom by which the tenant cultivating according to the course of good husbandry, was entitled, on quitting, to receive a reasonable allowance in respect of seed and labor bestowed on the arable land in the last year of his tenancy, and was bound to leave the manure for the landlord, if he would purchase it, was held not to be excluded by a stipulation in the lease that he would consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be so spread on the land, on receiving a reasonable price for it.

From the above luminous judgment of Baron Parke it may be collected, that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they are silent.

1st. In contracts between landlord and tenant.

2d. In commercial contracts.

3d. In contracts in other transactions of life, in which known usages have been established and prevailed.

But that such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable; and this inconsistency may be evinced,

1st. By the express terms of the written instrument.

2d. By implication therefrom.

With respect to the first class of cases in which the evidence has been received, viz. that of contracts between landlord and tenant, that is so thoroughly discussed in Hutton v. Warren, part of the judgment in which is above set out, and in Wigglesworth v. Dallison, the principal case, that it seems unnecessary to say more on that head of the subject. See Holding v. Pigott, 7 Bingh. 465; Roberts v. Barker, 1 C. & M. 803; Hughes v. Gordon, 1 Bligh. 287; Clinan v. Cooke, 2 Sch. & Lef. 22; White v. Sayer, Palm. 211; Farley v. Wood, 1 Esp. 198; Doe v. Benson, 4 B. & A. 588.

With respect to commercial contracts, it has long been established that evidence of an *usage of trade* applicable to the contract, and which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the written instrument is silent. The words "*usage* of trade" are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles, and analogies, not from evidence *in pais*, and the knowledge of which resides in the breasts of the Judges. (See Vallejo v. Wheeler, Lofft 631; Eden v. E. I. Company, 1 Wm. Black. 299, 2 Burr. 1216; *sed vide* Haille v. Smith, 1 B. & P. 563, in which evidence of the general custom of merchants was received.) This distinction, indeed, between the general custom of merchants, which is part of the law of the realm, and the particular usages of certain particular businesses, was not, it seems, so clearly marked in former times as it is now; thus we find Buller, Justice, saying, 2 T. R. p. 73, that "within the last thirty years (his lordship spoke in 1787) the commercial law of this country has taken a very different turn from what it did before. Before that period we find that, in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury, and produced no established principle. From that time we all know the great study has been to find some certain general principles which shall be known to all mankind; not only to rule the particular case then under consideration, but to serve as a guide for the future."

But with regard to particular commercial usages, evidence of them is admissible either to engraft terms into the contract, as in those cases concerning the time, for which the underwriters' liability in respect of the goods shall continue after the arrival of the ship, Noble v. Kennoway, Dougl. 510, and see the observations on this case in Ougier v. Jennings, 1 Camp. 503, n. or to explain its terms, as was done in Udhe v. Walters, 3 Camp. 16, by showing that the Gulf of Finland, though not so treated by geographers, is considered by mercantile men part of the Baltic. See further Robertson v. Clarke, 1 Bingh. 445; Moxon v. Atkins, 3 Camp. 200; Vallance v. Dewar, 1 Camp. 403 *et notas*; Cochran v. Retburg, 3 Esp. 121; Birch v. Depeyster, 1 Stark. 210, 4 Camp. 385; Donaldson v. Forster, Abb. on Shipp. part 3, cap. 1; Baker v. Payne, 1 Ves. Jr. 459; Raitt v. Mitchell, 4 Camp. 156; Lethulier's case, 2 Salk. 443; Charaud v. Angerstein, Peake, 43; Bold v. Rayner, 1 Mee. and Welsb. 446; Powell v. Horton, 2 Bingh. N. C. 668.

So in a case not falling within the head of mercantile contracts, evidence has been received to show that by the custom of a particular district the words '1,000 rabbits' meant 1,200 rabbits. Smith v. Wilson, 3 B. & Ad. 728.

But the admissibility of evidence of custom to explain the meaning of a word used in any contract whatever, is subject to this qualification, *viz.*, that if an Act of Parliament have given a definite meaning to any particular word denoting weight, measure, or number, it must be understood to have been used with that meaning, and no evidence of custom will be admissible to attribute any other to it; *per curiam* in Smith v. Wilson; see also Hockin v. Cooke, 4 T. R. 314; The Master of St. Cross v. Lord Howard de Walden, 6 T. R. 338; Wing v. Erle, Cro. Eliz. 267. In Doe v. Lea, 11 East, 312, it was held, that a lease by deed of lands since the new style, to hold from the feast of St. Michael, must mean *New* Michaelmas, and could not be shown by parol evidence to refer to Old Michaelmas. In Furley v. Wood, 1 Esp. 198, Runn. Eject. 112, Lord Kenyon had under similar circumstances admitted parol evidence of the custom of the country to explain the meaning of the word Michaelmas; and the court, in Doe v. Lea, on hearing that case cited, asked whether the holding there was *by deed*, which it does not appear to have been; and to which it may be added, that it appears possible that it was not even in writing.

In Doe v. Benson, 4 B. & A. 588, evidence of the custom of the country was held admissible for the purpose of showing that a letting *by parol* from Lady-day, meant from Old Lady-day. The court referred to Furley v. Wood, and distinguished that case from Doe v. Lea, on the ground that the letting there was *by deed*, " which," said Holroyd, Justice, " is a solemn instrument; and *therefore* parol evidence was inadmissible to explain the expression Lady-day there used, even supposing that it was equivocal. It is perhaps not easy to conceive a distinction, founded on principle, between the admissibility of evidence to explain terms used in a *deed*, and terms used in a written contract not under seal: for though, when the terms of a deed are ascertained and understood, the doctrine of estoppel gives them a more conclusive effect than those of an unsealed instrument; yet the rule that parol evidence shall not be admitted to vary the written terms of a contract seems to apply as strongly to a contract without a seal as with one; while, on the other hand, it appears from the principal case of Wigglesworth v. Dallison, without going further, that in cases where parol evidence is in other respects admissible, the fact that the instrument is under seal forms no insuperable obstacle to its reception. Nor does it seem necessary, in order to prevent a contradiction between Doe v. Lea, and Doe v. Benson, and Furley v. Wood, to establish any such distinction between deeds and other written instruments; for in Doe v. Benson the letting seems not to have been in writing, so that the objection to the admission of parol evidence, founded upon the nature of a written instrument, did not arise. In Furley v. Wood, the letting was perhaps also by mere parol; and though the evidence was, it is true, offered to explain the notice to quit, still it may be urged, that when the holding was once settled to commence from Old Michaelmas, the notice to quit, which probably contained the words, " at the expiration of your term," or something *ejusdem generis*, must be held to have express reference to, and to be explained by, it. We must not therefore, it is submitted, too hastily infer that parol evidence of custom would be receivable to explain a word of time used in a lease in writing, but not under seal.

Doe v. Lea was acted upon by the Court of Common Pleas in Smith v. Walton, 8 Bingh. 238, where the defendant avowed for rent payable " at *Martinmas, to wit*, November, 23d;" the plaintiff pleaded *non tenuit*; and a holding from *Old* Martinmas having been proved, the court thought that the words after the *videlicet* must be rejected, as inconsistent with the term Martinmas, which they thought themselves bound by statute to interpret November 11th; that no evidence was admissible to explain the record; and that there was, therefore, a fatal variance between it and the evidence;

see Hockin v. Cooke, 4 T. R. 314; The Master of St. Cross v. Lord Howard de Walden, 6 T. R. 338; Kearney v. King, 2 B. & A. 301; Sprowle v. Legge, 1 B. & C. 16.

However, evidence of usage, though sometimes admissible to add to, or explain, is never so to vary, or to contradict either expressly or by implication, the terms of a written instrument. Thus, in Yeates v. Pym, 6 Taunt. 445, in an action on a warranty of *prime singed bacon*, evidence was offered of an usage in the bacon trade, that a certain latitude of deterioration called "average taint" was allowed to subsist before the bacon ceased to answer the description of *prime bacon*. This evidence was held inadmissible, first at *Nisi Prius*, by Heath, Justice, and afterwards by the Court of Common Pleas. In Blackett v. Royal Exchange Insurance Company, 2 Tyrrwh. 266, which was an action on a policy upon '*ship*, &c., *boat, and other furniture*,' evidence was offered that it was not the usage of underwriters to pay for boats slung on the davits, on the larboard quarter; but was rejected at *Nisi Prius*, and the rejection confirmed by the Court of Exchequer. "The objection," said Lord Lyndhurst, delivering judgment, "to the parol evidence is, not that it was to explain any ambiguous words in the policy, or any words which might admit of a doubt, or to introduce matter upon which the policy was silent, but that it was at direct variance with the words of the policy, and in plain opposition to the language it used, *viz.*, that whereas the policy imported to be upon ship, furniture, and apparel generally, the usage is to say, that it is not upon furniture and apparel, generally, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain." In Roberts v. Barker, 1 Cr. & Mee. 808, the question was, whether a covenant in a lease, whereby the tenant bound himself not, on quitting the land, to sell or take away the manure, but to leave it to be expended by the succeeding tenant, excluded the custom of the country, by which the outgoing tenant was bound to leave the manure, and was entitled to be paid for it. The court held that it did. "It was contended," said Ld. Lyndhurst, delivering judgment, "that the stipulation to leave the manure was not inconsistent with the tenant's being paid for what was so left, and that the custom to pay for the manure might be engrafted on the engagement to leave it. But if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as, by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part." See further Reading v. Menham, 1 M. & Rob. 236.

Lord Eldon, in Anderson v. Pitcher, 2 B. & P. 168, expressed an opinion, that the practice of admitting usage to explain contracts ought not to be extended. In Cross v. Eglin, 2 B. & Ad. 106, evidence had been offered for the purpose of showing that the plaintiffs, who had contracted for "300 *quarters (more or less) of foreign rye*," could not, consistently with the usage of trade, be required to receive so large an excess as 45 quarters over the 300: the question as to the admissibility of the evidence ultimately proved immaterial; but Littledale, J. said that where words were of such general import, he should feel much difficulty in saying that evidence ought to be received to ascertain their meaning.

2597. WILBUR v. SELDEN, 6 Cowen, 162; (R. v. Joliffe, 4 T. R. 290).

The person called to prove what a deceased witness said on a former trial, must repeat the very words.

Denied in Cornell v. Green, 10 S. & R. 16; Chess v. Chess, 17 ib. 409; Ballenger v. Barnes, 3 Dev. R. 460; Bowie v. O'Neale, 5 H. & J. 226; 12 Wend. 45; Pegram v. Isabell, 2 H. & M. 193; Mayor of D. v. Day, 3 Taunt. 261.

2598. WILCOX v. HEWSON, Mo. 696.

A deed or writing obligatory may be delivered as an escrow to the party himself.

Overruled. Halford v. Parker, Hob. 520. 835. 884; 43 E. 3. fo. 27. 19. Ass. pl. 18; 9 Co. 636 b.

2599. WILD v. FISHER, 4 Pick. 421.

S. P. as in Pierce v. Crofts—Held, in an action by the endorsee of a promissory note against the maker, that the plaintiff might give the note in evidence under the common money counts. Denied in Kennedy v. Carpenter, 2 Whart. R. 354.

2600. WILD'S CASE, 6 Coke R. 17.

That a gift to one and his issue or children, who has issue or children living, creates a joint tenancy.

Denied in Lumpley v. Blower, 3 Atk. 397—Hardwicke:—"that was before it was fully settled that the word issue was as proper a word of limitation as heirs of the body."

2601. WILKES v. JACKSON, 2 Hen. & Mumf. 355.

S. P. as in Brown v. Wootton, (ante).

2602. WILKES v. JORDEN, Hob. 5.

Error in fact is assignable in the Excheq. and House of Lords.

Oppo. Roe v. More, Com. 597; Prior v. ——, 1 Vent. 207; Evans v. Roberts, 3 Salk. 146; Holt, 278; 2 Saund. 101 a.

2603. WILKES v. MOORFOOTS, Cro. Eliz. 86.

Overruled in Gibbs' case, Owen, 27; 1 Leon. 158.

2604. WILKINSON v. COVERDALE, 1 Esp. R. 5.

Denied (in Amer. Jurist, No. 32. Jan. 1837):—"That is a short *nisi prius* case, of a not very accurate *nisi prius* reporter."—"The case as stated, is a slim authority for any thing." Vid. Thorne v. Deas, 4 J. R. 100.

2605. WILLARD v. TWITCHEL, 1 N. H. R. 177.

S. P. as in Manton v. Hobbs, (ante).

2606. WILLES' REPORTS.

"Willes' Reports were not published in more than half a century after

the decision of Omychund v. Barker, (reported in Willes, 549, and 1 Atk. 45,) and the manuscript was furnished by his grandson."

2607. WILLEY v. CAWTHORNE, 1 East, 398.

Doubted in Horwood v. Underhill, 4 Taunt. 346.

2608. WILLIAMS v. BOSANQUET, 1 Bro. & Bing. 72, by ten judges overruling the doctrine of Ld. Mansfield, in Eaton v. Jaques.

Denied in Astor v. Hoyt, 5 Wend. 614, asserting the doctrine of Ld. Mansfield, in Eaton v. Jaques, 'that upon principle the assignee is liable only in respect of the possession, and that as a mortgage was a mere security, the mortgagee out of possession was not liable as assignee:' the Court, Savage, C. J., saying, "It is too late for us now to retrace our steps and adopt the doctrine of Williams v. Bosanquet, even if it was correct."

2609. WILLIAMS v. BROWN, 2 Stra. 996.

This case adopts the prinoiple of Comber v. Hill, 2 Str. 969, *quód* vid. ante.

2610. WILLIAMS v. CALLENDER, Holt's R. 307.

S. P. as in Leicester v. Walter, (ante).

2611. WILLIAMS v. DUKE OF BOLTON, Dick. 405.

Doubted in Math. on P. Ev. 121, note (b).

2612. WILLIAMS, EX PARTE, 4 D. & E. 124.

S. P. as in Brickwood v. Fanshaw, ante.
Overruled in Clark v. Donovan, 5 D. & E. 694.

2613. WILLIAMS v. MADIE, (or MUNDIE), 1 C. & P. 158; S. C. Ry. & Moo. 34.

Abbott C. J. ruled that whatever is communicated to an attorney for the purpose of bringing or defending an action is privileged, but not otherwise.

Overruled in Doe v. Harris, 5 C. & P. 592; see Cromack v. Heathcote, 2 Bro. & B. 4; S. C. 4 Moore's R. 357; Robson v. Kemp, 4 Esp. R. 235; 3 Esp. 52—Lord Ellenborough; Foster v. Hall, 12 Pick. 89; Parkhurst v. Lawson, 2 Swans. R. 216—Lord Eldon; 1 Phil. Ev. 134; Greenhough v. Gaskell, 1 Coop. Sel. Ca. 96. (8 Cond. p. 400.)

2614. WILLIAMS v. THORP, 8 Cowen, 201.

The plaintiff offered his attorney as a witness; defendant objected, because he had sent to plaintiff to compromise; and the latter said 'he must first see his attorney;' and the court rejected the witness.

Doubted. Vide Murray v. Coster, 4 Cowen, 635; 2 John. R. 576; 4 Conn. 142; 5 ib. 416, and 4 Pick. 374.

2615. WILLIAMSON v. FARLEY, Gilm. 15.

Doubted in Snydor v. Gee, &c., 4 Leigh R. 647.

2616. WILLIAMSON & UX. v. LASH, EX., MS. Ashhurst, J. Paper-Books, Vol. 19, p. 54, cited 7 T. R. 351.

Denied. See Chit. on B. 85. n. (i).

2617. WILLING v. CONSEQUA, 1 Wash. C. C. R. 307.

Washington, J. held, that a party plaintiff of record, not having an interest in the suit, may be admitted as a competent witness.

Doubted in Levy v. Burley, 2 Sum. R. 361—Story.—'That decision has not been thought entirely satisfactory.'

2618. WILLING v. ROWLAND, 4 Dall. 106, note.

Overruled in Girard v. Taggart, 5 S. & R. 19.

2619. WILLIS v. BAILEY, 19 J. R. 268.

Reviewed in Wallis v. Murray, 4 Cow. 401, and in Townsend v. Lawrence, 9 Wend. 459, in respect to compelling a party to produce books.

2620. WILLIS v. BALDWIN, Doug. 450.

Doubted in Graham v. Walker, 2 Moll. Ch. R. 443.

2621. WILLIS v. EVANS, 2 Ball. & B. 225.

Denied in Fitzpatrick v. Power, 1 Hogan, 24.

2622. WILSON v. DUCKET, 3 Burr. 1361.

Same doctrine as in Whittingham v. Thornburg.

2623. WILSON v. MILNER, 2 Camp. 452.

Ld. Ellenborough said, that 'among joint tort-feasors there was neither contribution, nor implied promise of indemnity. Thus, a levy is made after act of bankruptcy and the money paid over to the creditor: the assignees then recover against the sheriff; *held*, that the latter had no remedy against the creditor to recover back the money.

Overruled in Betts v. Gibbins, 2 Ad. & Ell. 57:—Ld. Denman, C. J.—"The general rule is, that between wrong doers there is neither indemnity nor contribution: the exception is, where the act is not clearly illegal in itself."—Again—"In Wilson v. Milner, 2 Camp. 452, he (Ld. Ellenborough) certainly did go to the point. That, however, is only a *nisi prius* decision; and if the effect of it was, that wherever it turns out that the parties are wrong, there can be no indemnity, I think the decision is not sustainable." See 4 Bing. 72.

2624. WILSON v. PAULTER, Str. 794.

A defendant in trover was charged with his *confession* taken before commissioners of bankrupt, and the Chief Justice refused to let the defendant explain it by parol evidence.

Doubted by Stark. Ev. 571, 2 :—"It is not stated in what way the defendant proposed to explain the document ; and it would not be safe to rely much on so very loose a report." See also Rowland v. Ashby, 1 Ry. & M. 231.

2625. WILSON v. SMITH, 3 Burr. 1550.

That the words in the memorandum at the foot of policies of assurance import an exception only, and not a condition.

Overruled in Burnet v. Kensington, 7 D. & E. 210.

2626. WILSON v. STUBBS, Hob. 330.

Daggett, J. (in Coit v. Starkweather, 8 Conn. R. 295,) says, "it is difficult to understand the case of Wilson v. Stubbs. The question arose upon a description in a writ of one Ralph Stubbs. There were father and son of the same name, and the court say—' defendant being named Ralph Stubbs, without any addition, shall never be accounted the younger, but always the elder of the two of that name.' (How can this be reconciled with the cases in 2 Dall. 70; 1 Black. 60, and 2 P. Wms. 141.) A more satisfactory report of this case is in Cro. Jac. 624, by the name of Stubbs v. Cook, where it appears, that the suggestion of the court in the case in Hobart, that Ralph Stubbs without addition, should never be accounted the younger, but always the elder of that name, is done away, *by the trial of the cause.* The case proves that when there are father and son of the same name, an enquiry may be instituted to ascertain which is intended."

2627. WILSON'S CASE, Holt, 597.

Where an examination (taken under the statute of P. & M.) was offered in evidence, and the magistrate who took it, stated that he had examined the prisoner, in the same manner as he was accustomed to examine a witness, the examination for that cause was rejected.

Overruled in Jones' case, 2 Russ. 658, (n); Ellis' case, Ry. & Moo. N. P. C. 432.

2628. WILTON v. HARDINGHAM, Hob. 129.

Overruled in Brook v. Hustler, 1 Salk. 56; Vid. 1 Wils. 251. per Lee, C. J.

2629. WINDHAM v. CLERE, Cro. El. 133; 1 Leon. 187.

That in an action against a justice for maliciously granting a warrant

without accusation, it is not necessary to state that the prosecution is at an end.

"Certainly cannot be law." Per Ashhurst, J. in Morgan v. Hughes, 2 D. & E. 231.

2630. WINDHAM v. LORD WYCOMBE, 4 Esp. R. 16.

Held, that the infidelity of the husband was a defence to an action of crim. con.

Bromley v. Wallace, 4 Esp. R. 237—Best, C. J.

2631. WINSTEAD v. HEIRS, &c. 1 Hayw. R. 243.

S. P. as in Hodges v. M'Cabe, (ante).

Overruled in Frost v. Etheridge, 1 Dever. R. 30.

2632. WINSMORE v. GREENBANK, Willes, 582.

Inasmuch as it appears, that at the time of the employment of the apprentice, defendant knew not of the apprenticeship, no action can be maintained against him, until after a demand of the apprentice, and a refusal to deliver him up.

Denied in Ferguson v. Tucker, 2 Maryland R. 190; Blake v. Lanyon, 6 T. R. 221.

2633. WINTER v. LORD ANSON, 1 Sim. & Stu. 434.

Doubted in S. C. 3 Russ. R. 488; but see 3 Sim. 499; 2 Sugd. on Vend. 58; 4 K. C. 152, (3d ed.)

2634. WINTER v. BROCKWELL, 8 East, 309.

Doubted in Bridges v. Purcell, 1 Dev. & B. 492—Gaston. Held, that the grant of an incorporeal hereditament, is void, if by parol, for want of a deed—if a mere authority, it can be revoked, and ceases with the life of the grantor, although a dam had been erected under the license.

2635. WINTHAM v. LEWIS, 1 Wils. 48.

That if, in a special verdict, the jury find a recovery, but omit to find a writ of seisin on execution, it cannot be presumed by the court: and no advantage can be taken of the recovery, nor will the court award a *venire fa. de novo.*

Ld. Kenyon said this had always been considered a "strange case;" and judges of succeeding times had been astonished that no application had been made to C. B. to rectify the defect of that recovery. Goodright v. Bigby, 5 D. & E. 179.

2636. WINTON v. SAIDLER, 3 J. Cas. 183. 185.

S. P. as in Walton v. Shelly, (ante).

Overruled in Bank of Utica v. Hillard, 5 Cowen, 153; Williams v. Wallbridge, 3 Wend. 416.

2637. WITHAM v. BARKER, Yelv. 148.

Much shaken in Lambert v. Stroother, Willes, 221; Chambers v. Donaldson, 11 East, 65.

2638. WITHERS v. HARRIS, 7 Mod. 64.

"Judgment was given in ejectment upon terms, that there should not be execution until such a time, which was a year and a half after. The sole question was, whether this judgment could be executed without a scire facias?" and the report concludes, "the execution was set aside as irregular, and restitution granted."

Denied in Hiscocks v. Kemp, 3 Ad. & El. 676—Denman :—"There are seven other reports of this case referred to in the margin, one in the same volume, p. 50, three in Salkeld, 1 Salk. 258, 2 Salk. 600, 3 Salk. 319, two in Holt, (Holt, 77. 265; in the latter report it is stated that the judgment was upon conditional terms, &c., but no other notice is taken of the fact); and one in Ld. Raymond, (2 Ld. Raym. 806): in no one of these is the fact stated that the execution was stayed on terms, nor in the report cited at the bar is it mentioned in the arguments or judgment."

The court in Hiscocks v. Kemp, held, that it was not necessary to revive a judgment by scire facias for the purpose of issuing execution after a year and a day, where the execution has been suspended by agreement of the parties.

2639. WITHERS v. REEVE, 5 J. Ch. R. 235.

Reversed in Cowes v. Dickenson, 9 Cowen, 403.

2640. WITHERSPOON v. M'CALLA, 3 Dess. Eq. R. 245.

S. P. as in Liber v. Parsons, (ante).

2641. WOOD v. BATES, W. Jo. 171, 172.

Condition in disjunctive, and one part becomes impossible by act of God; obligor is not bound to perform the other part.

Oppo. Basket v. Basket, 2 Mod. 204.

2642. WOOD et al. v. BRADDOCK, 1 Taunt. R. 104.

That the declarations of a partner, made after dissolution, are admissible to establish a contract against his co-partner.

Overruled in Owings et al. v. Low, 5 Gill & J. 134, 5.

2643. WOOD v. BRIDDEN, Hobart, 119.

Doubted in Moore v. Bolcott, 3 Dowl. Pr. R. 145—Per Curiam—

"All the authorities are one way except the case in *Hobart's Reports*, and there the objection was not taken till after verdict."

2644. WOOD v. CRITCHFIELD, 1 Dowl. Pr. R. 587; 1 Cr. & M. 72, S. C.

Oppo. Levy v. Duncombe, 3 Dowl. Pr. R. 447.

2645. WOOD v. DRURY, 1 Ld. Raym. 734.

"A deed was produced, to which there were two witnesses, one of whom was blind. It was ruled by Ld. Holt, that such deed might be proved by the other witness and read, or might be proved, without proving that the blind witness is dead, or without having him at the trial, proving only his hand."

Doubted by Ch. J. Marshall, in 1 Brock. R. 141 *et seq.*:—"This report is too indistinct, and too short, to be satisfactory. It would seem, however, that the deed was proved, by proving the hand-writing of the blind witness. Perhaps, in addition to this, the execution of the deed was proved by the other witness, and that which would indicate the contrary, may be ascribed to the inaccuracy of the reporter. I am inclined to think it is." Sed see 1 Phil. Ev. 473, note.

2646. WOOD v. GRIFFITH, 1 Mer. 35.

Doubted, Brophy v. Holmes, 2 Moll. 7.

2647. WOOD v. INGERSOLE, Cro. Jac. 260.

A testator devises three distinct parcels of land severally to his three sons, and if either of them should die, the other surviving should be his heir;—the eldest has issue and dies:—held that the descent of the fee upon him at the father's death had merged the freehold devised, and destroyed the contingent remainder.

Resolved not to be law, in Fortescue v. Abbott, 2 Lev. 202; Sir T. Jones, 79; vid. 2 Saund. 382. c. n.

2648. WOOD v. JACKSON, 8 Wend. 1.

A judgment reversing the decision of the Supreme Court, and affirming that of a former verdict or decree must be plead in order to avail the party.

Oppo. Howard v. Mitchell, 14 Mass. 24.

2649. WOOD v. LAKE, Sayer, 3.

A parol agreement was entered into for liberty to stack coals on part of a close for seven years, and that during this term the person to whom it was granted should have the sole use of that part of the close upon which he was to have the liberty of stacking coals. (It is not stated, but the fact is, that an annual payment was reserved in respect of the easement. 1 Sugd. on V. 80. (1).) Held, that the agreement was good for the seven years.

Denied in 1 Sug. on Vend. p. 80, *et seq.*; though he says "it has been followed in several recent cases." See Mumford v. Whitney, 15 Wend. 386, *et seq.*; and cases cited.

2650. WOODBRIDGE v. BINGHAM, 12 Mass. 403.

This report of the case is erroneous. Vid. 13 Mass. 556. S. C.

2651. WOODFALL'S LAW OF LANDLORD AND TENANT, (ed. pub. in 1802).

In Wright v. Dewes, 3 Nev. & M. 801—Taunton—"About nineteen out of twenty of the positions in that work are unsupported by authority."

2652. WOODMESTON v. WALKER, 2 Russ. & My. 210; and 2 M. & K. 189.

Decides that a woman *sui juris* may dispose, if she think fit, of property given to her, notwithstanding a limitation to her separate use, and a clause against anticipation which has reference to any future coverture.

Doubted in Benson v. Benson, 13 Law Mag. p. 155, note (1), the V. Chancellor noticed "the fright" among conveyancers in consequence of Lord Brougham's decision in Woodmeston v. Walker, expressed a desire that the subject of limitations to separate use, and clauses in restraint of alienation, as applied to unmarried women, might be re-considered before the present Lord Chancellor. It is said also that "the fright" (if any) among conveyancers, is, at least, as much referable to Newton v. Reid, (4 Sim. 141, *ante*) as to Woodmeston v. Walker.

2653. WORDELL v. SMITH, 1 Camp. R. 332.

That an assignment of property without a change of possession, is fraudulent and void as against creditors.

Denied in Eastwood v. Brown, 1 Ry. & M. 312.—Abbott, C. J.—"It is not of itself a *conclusive* badge of fraud."

2654. WORMLEIGHTON & HUNTER'S CASE, Godb. 243.

Overruled in Cowell v. Edwards, 2 Bos. & Pul. 268.

2655. WORTH v. VINER, 3 Vin. Abr. 8 & 9; Bro. Abr. "*Apportionment*," pl. 13. ib. "*Laborers*," pl. 48. ib. *Contract*, pl. 31.

For the old law in respect to wages for service:—Held, that in the common case of service, if a servant who is hired for a year die in the middle of it, his executor cannot recover part of his wages in proportion to the time of service.

Overruled in Cutter v. Powell, 6 T. R. 320. See also 2 C. & P. 510, n. See 2 Phill. Ev. 116, *in notis*. "With regard to the common

case of an hired servant; such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year." Per Lawrence, J. in Cutter v. Powell, (supra).

2656 WORTHINGTON v. BARLOW, 7 Term, 453.

S. P. as in Barry v. Rush, (ante).

2657. WRIGHT v. JACOBS, 1 Aik. R. 304; PENFILD v. COOK, 1 ib. 96.

S. P. as in Wolcott v. Day.

2658. WRIGHT v. LATHAM, 3 Murph. R. 298.

In an action by indorsee v. indorser, *held*, that parol evidence might be given of a special agreement entered into between the parties at the time of the indorsement, that the indorsee should sue the maker of the note, and endeavor to obtain payment of him; and if such endeavors prove unavailing, that the indorser should be liable.

Denied in S. C. by Taylor, C. J. citing 1 Taunt. 347, and 8 John. 189.

2559. WRIGHT v. PAULIN, R. & M. N. P. C. 128.

Best, C. J. denied the right of a defendant in an action of tort, to an acquittal until all the evidence in favor of the other defendants were gone through.

Oppo. Russell v. Rider et al., 6 Car. & P. 416—Bosanquet, J. observing—The new rule with respect to defendants not fixed by the evidence is, that the verdict in their favor is to be taken at the end of the plaintiff's case.

2660. WRIGHT v. WRIGHT, 1 Cowen, 598.

Denied in Raymond v. Sellick, 10 Conn. 486—Waite, J. and Holliday v. Atkinson, 5 B. & C. 501; where it was *held*, that affection, friendship and gratitude are insufficient considerations to support promissory notes. See Parish v. Stone, 14 Pick. 206, 7.

2661. WYATT'S PR. REGISTER, 209.

All the executors must join, as well he who does not take out probate as he who does, unless he renounces.

Overruled in Cramer v. Morton, 2 Moll. Ch. R. 109:—"Has been ruled differently more than 20 years."

2662. WYATT v. SADLER'S HEIRS, 1 Mum. 537.

S. P. as in Kennon v. M'Roberts, (ante).

2663. WYBORNE v. ROSS, 2 Taunt. 58.

A cognovit is not discharged by bankruptcy and certificate.

Overruled in Metcalf v. Watling, 2 Dowl. Pr. R. 552. See also Vansandon v. Crosbie, 2 B. & Adol. 779.

2664. WYNDHAM v. LD. WYCOMBE, 4 Esp. 16.

In an action for crim. con. Ld. Kenyon ruled that the notorious undisguised infidelity of the husband was a complete answer to the action.

But Ld. Alvanley afterwards denied this, and held that such conduct went only in mitigation of damages. Bromley v. Wallace, 4 Esp. 237; Vid. Finnerty v. Tipper, 2 Camp. 72. acc. See 4 C. & P. 499.

2665. YATE v. WILLAN, 2 East, 128.

Overruled in Clarke v. Gray, 6 East, 564:—Held, that common carriers who had given notice limiting their liability to £5 for the loss of goods, unless entered and paid for as of a higher value; and the goods being of a higher value, defendants were allowed to bring £5 into court. See 6 Pick. 347, 8.

2666. YATES, J. V. N. J. (case of) 4 John. R. 316.

Reversed in John V. N. Yates v. The People, 6 John. R. 337.

2667. YEA v. BUCKNELL, Cowp. 473.

Vid. Weakley ex dem. Yea v. Bucknell, ante.

2668. YEA v. LETHBRIDGE, 4 D. & E. 433.

That for taking insufficient pledges in replevin, the sheriff is not liable beyond the value of the distress taken, though that was not equal to the rent in arrear.

Denied in Concanen v. Lethbridge, 2 H. Bl. 36; and in Evans v. Brander, ib. 547, where the rule of damages was, the liability of the sureties, viz. double the value of the goods taken. See Hunt v. Round, 2 Dowl. Pr. R. 558.

2669. YEATMAN v. WOODS, 6 Yerg. R. 20.

S. P. as in M'Alister v. Montgomery, (ante).

2670. YELVERTON, 153.

The words—"When thou wert a justice, thou wert a bribing justice" were held actionable.

Denied in Forward v. Adams, 7 Wend. 208.

2671. YOUNG v. AXTELL, cited in Waugh v. Carver, 2 H. Bl. 235, from a MS. note.

It is laid down, that one suffering his name to be used in the busi-

ness, and held out as a partner, is liable though the plaintiff did not know that he was a partner, or that his name was used.

Doubted. See Dickenson v. Valpy, 10 B. & C. 140, where Mr. J. Parke, says :—"If it could be proved that the defendant held himself out—*not to the world*, for that is a loose expression—but *to the plaintiff himself*, or under such circumstances of publicity as to satisfy a jury that the plaintiff *knew of it, and believed him to be* a partner, he would be liable." See also Shott v. Streatfield, Moo. & Rob. 9; Alderson v. Pope, 1 Campb. 404, n.

2672. YOUNG v. BECK, 2 Dowl. P. C. 462.

Overruled in S. C. 1 Cromp. M. & Ros. 448.

2673. YOUNG, EX PARTE, 2 Ves. & B. 242.

That a joint owner of a vessel has no lien on the share of his co-owner for a balance which may be due to him.

Overruled in Mumford v. Nicoll, 20 John. R. 611, (reversing 4 J. Ch. 522. S. C.) But see the observations of Hopkinson, J., in 1 Gilpin, 460 :—"I should be disposed to follow the opinion of Ld. Eldon in the case of Young, Ex parte, 2 Ves. & B. 242, as Ch. Kent did on this question in the case of Mumford v. Nicoll, (4 J. Ch. R. 522.) although a majority of the judges in the Court of Appeals, (errors), seemed inclined to support the opinion of Ld. Hardwicke, in the case of Doddington v. Hallet, (1 Ves. 497,) which was in favor of the lien."

2674. YOUNG v. REUBEN, 1 Dall. 119.

Denied in Wood v. Earl, 5 Rawle, 45—"Were the precise point in Young v. Reuben (1 Dall. 119) now before us, that case would not be recognized as a precedent."

2675. YOUST v. MARTIN, 3 S. & R. 423.

Denied in Dugan v. Vattier, 3 Black. R. 242; Doswell v. Buchanan's Ex., 3 Leigh, 365 :—Held, that a purchaser from a fraudulent grantee in order to hold the estate against creditors of the original grantor must have paid *all* the purchase money and the deed have been executed, before the notes.

2676. ZOUCH v. PARSONS, 2 Burr. 1136.

Doubted in Shannon v. Bradstreet, 1 Sch. & Lef. 66. 71, as to some passages there;—but recognized in Bort v. Mix, 17 Wend. 119.

2677. ZOUCH v. WOOLSTON, 2 Burr. 1147.

Where Ld. Mansfield is made to say that "whatever is an equitable, ought also to be deemed a legal execution of a power," &c.

This was doubted by Ld. Redesdale, in 1 Sch. & Lefr. 70. Vid. also Roe v. Prideaux, 10 East, 186.

ADDENDA.

1. ACEBAL v. LEVY, 10 Bing. 376.

Overruled in Hoadley v. M'Laine, 10 Bing. 482. See Brown v. Bellows, 4 Pick. 179.

2. ANON. 2 Atk. 1; DORMER v. FORTESCUE, ib. 282.

The mere pendency of a bill in chancery against the claimant is not sufficient to take the debt out of the statute of limitations.

Oppo. Anon. 1 Vern. 73, but this seems at variance with the better authorities of Hurdret v. Caladen, 1 Ch. R. 214; Craddock v. Marsh, ib. 205; Peerer v. Belamy, ib. cited 2 Vern. 504; Lake v. Hays, 1 Atk. 282; and 2 Atk. 1.

3. ASHBROKE v. SNAPE, Cro. Eliz. 240; ib. 194.

Assumpsit lies upon an express promise to pay money due by bond.

Denied in Buckingham v. Costendine, Cro. Jac. 214.

4. BERRE v. WHITE, Bridg. by Ban. 94.

Denied in Sug. on Pow. p. 410, 411 (Lond. ed.) p. 222. (Am. ed.)

5. COLLINS v. BLANTERN, 2 Wils. 341.

Illegality may be pleaded as a defence to an action on a bond.

Limited and applied in Hill v. Manch. & S. W., 2 B. & Ad. 552; 5 B. & Ad. 874. S. C.

6. DOE d. TEYNHAM v. TYLER, see No. 2366, ante.

7. DOLERAINE v. BROWN, 3 Brown C. C. 663.

Doubted in Hovendon v. Ld. Annesley, 2 Sch. & Lef. 637—Redesdale; but see his Pleadings, p. 173, 4, (3d ed.)

8. FOWKES v. JOICE, 2 Ventr. 50; 3 Lev. 260; 2 Lutw. 1161, S. C.

Denied in 3 Bl. Com. 8, (15 ed.) by Mr. Christian. See Horsford v. Webster, 1 Cromp. M. & Ros. 696.